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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 829.

THE UNITED STATES EX REL. THE CONCORD SAVINGS BANK,

PLAINTIFF IN ERROR,

vs.

THE MAYOR AND COUNCILMEN OF THE CITY OF FORT SCOTT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED OCTOBER 8, 1878.

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fifty dollars, with interest thereon at the rate of ten per cent. per annum, payable annually, (and interest upon each instalment of interest,) from the 1st day of March, A. D. 1875.

2nd. And for a further cause of action, plaintiff avers that on the day and year aforesaid, the defendant made and delivered its certain other bond or writing obligatory numbered 108, of which with the coupon thereunto attached, and the endorsements thereon, "Exhibit A" hereunto appended is a true copy, except as to the number thereof, which is as herein set forth, of which said last-mentioned bond the plaintiff, for a valuable consideration, became the owner and holder before the maturity thereof, and still is the owner and holder thereof, and that there is due to plaintiff on the said bond the further sum of five hun-
3 dred and fifty dollars, with interest thereon, at the rate of ten per cent. per annum, payable annually, (and interest upon each instalment of interest,) from the said first day of March, A. D. 1875.

3d. And for a further cause of action plaintiff avers that on the day and year aforesaid, at the district aforesaid, the said defendant made and delivered its certain other bond or writing obligatory, numbered 109, of which, with the coupon thereunto attached and the endorsements thereon, "Exhibit A" hereto appended is a true copy, except as to the number thereof, which is as hereinbefore set forth, of which said last mentioned bond the plaintiff became the owner and holder for value before maturity, and still is the owner and holder thereof, and that on said last-mentioned bond there is due to the plaintiff the further sum of five hundred and fifty dollars, with interest at the rate of ten per cent. per annum, payable annually from March 1, 1875, and interest at the like rate on each instalment of interest from the maturity thereof.

4th. And for a further cause of action the plaintiff avers that heretofore, to wit: on the day and year aforesaid, at the district aforesaid, the defendant made and delivered its certain other bond or writing obligatory, numbered 110, of which "Exhibit A" hereunto appended is a true copy, together with the coupon thereto attached and the endorsements thereon, except as to the number thereof, which is as herein set forth, of which last-mentioned bond the plaintiff became the owner and holder thereof; and that there is due to the plaintiff upon the said last-mentioned bond the further sum of five hundred and fifty dollars, with interest thereon at the rate of ten per cent. per annum, payable
4 annually from March 1, 1875, and with a like rate of interest upon each instalment of interest from the maturity thereof.

5th. And for a further cause of action the plaintiff avers that heretofore, to wit: on the first day of June, A. D. 1872, at the

district aforesaid, the said defendant made and delivered its certain other bond or writing obligatory, numbered 111, of which, with the coupons thereto attached and the endorsements thereon, "Exhibit A" hereunto appended is a true copy, except as to the date and number thereof, which are as above set forth, of which said last-mentioned bond and coupon the plaintiff became the owner and holder for value before maturity, and still is the owner and holder thereof; and that there is due to the plaintiff on account thereof *thereof* the further sum of five hundred and fifty dollars, with interest at the rate of ten per cent. per annum, payable annually from March 1, 1875, and interest on each instalment of interest from the maturity thereof.

6th. And for a further cause of action this plaintiff avers that on the day and year last aforesaid, at the district aforesaid, the said defendant made and delivered its certain other bond or writing obligatory, numbered 112, of which, with the coupon thereto attached and of the endorsed thereon, "Exhibit A" hereunto appended is a true copy, except as to the number and date thereof, which are as herein set forth, of which said last-mentioned bond the plaintiff became the owner and holder for value before maturity, and still is the owner and holder thereof; and that there is due to the plaintiff thereon the further sum of five hundred and fifty dollars, with interest thereon at the rate of ten per cent. per annum, payable annually from March 1, 1875, and interest at a like rate upon each instalment of interest from the maturity thereof.

5 7th. And for a further cause of action the plaintiff says that heretofore, to wit, on the said first day of June, A. D. 1872, the said defendant, at the district aforesaid, made and delivered its certain other bond or writing obligatory, numbered 113, of which, with the coupon thereto attached, and the endorsements thereon, "Exhibit A," hereunto appended, is a true copy, except as to the date and number thereof, which are as herein set forth, of which last-mentioned bond the plaintiff became the owner and holder for value, before maturity, and still is the owner and holder thereof, and that there is due to the plaintiff thereon the further sum of five hundred and fifty dollars, with interest thereon at the rate of ten per cent. per annum from March 1, 1875, payable annually, and interest on each instalment of interest, at the like rate from the maturity thereof.

8th. And for a further cause of action the said plaintiff avers that heretofore, to wit, on the first day of March, A. D. 1872, the said defendant made and delivered its certain other bond or writing obligatory, attested by the signature of T. A. Corbett, city clerk, and certified by J. D. Rush, city treasurer, numbered 98, due and payable March 1st, 1874, of which, with the endorsements thereon, "Exhibit A," hereunto appended, is a true copy, except

fifty dollars, with interest thereon at the rate of ten per cent. per annum, payable annually, (and interest upon each instalment of interest,) from the 1st day of March, A. D. 1875.

2nd. And for a further cause of action, plaintiff avers that on the day and year aforesaid, the defendant made and delivered its certain other bond or writing obligatory numbered 108, of which with the coupon thereunto attached, and the endorsements thereon, "Exhibit A" hereunto appended is a true copy, except as to the number thereof, which is as herein set forth, of which said last-mentioned bond the plaintiff, for a valuable consideration, became the owner and holder before the maturity thereof, and still is the owner and holder thereof, and that there is due to plaintiff on the said bond the further sum of five hun-
3 dred and fifty dollars, with interest thereon, at the rate of ten per cent. per annum, payable annually, (and interest upon each instalment of interest,) from the said first day of March, A. D. 1875.

3d. And for a further cause of action plaintiff avers that on the day and year aforesaid, at the district aforesaid, the said defendant made and delivered its certain other bond or writing obligatory, numbered 109, of which, with the coupon thereunto attached and the endorsements thereon, "Exhibit A" hereto appended is a true copy, except as to the number thereof, which is as hereinbefore set forth, of which said last mentioned bond the plaintiff became the owner and holder for value before maturity, and still is the owner and holder thereof, and that on said last-mentioned bond there is due to the plaintiff the further sum of five hundred and fifty dollars, with interest at the rate of ten per cent. per annum, payable annually from March 1, 1875, and interest at the like rate on each instalment of interest from the maturity thereof.

4th. And for a further cause of action the plaintiff avers that heretofore, to wit: on the day and year aforesaid, at the district aforesaid, the defendant made and delivered its certain other bond or writing obligatory, numbered 110, of which "Exhibit A" hereunto appended is a true copy, together with the coupon thereto attached and the endorsements thereon, except as to the number thereof, which is as herein set forth, of which last-mentioned bond the plaintiff became the owner and holder thereof; and that there is due to the plaintiff upon the said last-mentioned bond the further sum of five hundred and fifty dollars, with interest thereon at the rate of ten per cent. per annum, payable
4 annually from March 1, 1875, and with a like rate of interest upon each instalment of interest from the maturity thereof.

5th. And for a further cause of action the plaintiff avers that heretofore, to wit: on the first day of June, A. D. 1872, at the

district aforesaid, the said defendant made and delivered its certain other bond or writing obligatory, numbered 111, of which, with the coupons thereto attached and the endorsements thereon, "Exhibit A" hereunto appended is a true copy, except as to the date and number thereof, which are as above set forth, of which said last-mentioned bond and coupon the plaintiff became the owner and holder for value before maturity, and still is the owner and holder thereof; and that there is due to the plaintiff on account thereof *thereof* the further sum of five hundred and fifty dollars, with interest at the rate of ten per cent. per annum, payable annually from March 1, 1875, and interest on each instalment of interest from the maturity thereof.

6th. And for a further cause of action this plaintiff avers that on the day and year last aforesaid, at the district aforesaid, the said defendant made and delivered its certain other bond or writing obligatory, numbered 112, of which, with the coupon thereto attached and of the endorsed thereon, "Exhibit A" hereunto appended is a true copy, except as to the number and date thereof, which are as herein set forth, of which said last-mentioned bond the plaintiff became the owner and holder for value before maturity, and still is the owner and holder thereof; and that there is due to the plaintiff thereon the further sum of five hundred and fifty dollars, with interest thereon at the rate of ten per cent. per annum, payable annually from March 1, 1875, and interest at a like rate upon each instalment of interest from the maturity thereof.

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8th. And for a further cause of action the said plaintiff avers that heretofore, to wit, on the first day of March, A. D. 1872, the said defendant made and delivered its certain other bond or writing obligatory, attested by the signature of T. A. Corbett, city clerk, and certified by J. D. Rush, city treasurer, numbered 98, due and payable March 1st, 1874, of which, with the endorsements thereon, "Exhibit A," hereunto appended, is a true copy, except

annum, of three thousand five hundred dollars thereof from March 1st, 1874, payable annually, and on the balance from March 1, 1875, with interest at the like rate on each annual instalment of interest from the maturity thereof, and for costs.

CONCORD SAVINGS BANK,
By BROWN & CAMPBELL,
its Attorneys.

UNITED STATES OF AMERICA,
District of Iowa.

I, James D. Campbell, being sworn, do say that I am a member of the firm of Brown & Campbell, who are the attorneys for the plaintiff in this suit; that this action is founded upon written instruments for the payment of money only, in the hands or possession of the said firm for collection; that I have read the foregoing petition and know the contents thereof, and that the several allegations therein contained are true, as I verily believe.

J. D. CAMPBELL.

Sworn to by the said J. D. Campbell before me, and by him subscribed in my presence, this 22d day of May, A. D. 1876.

S. E. BROWN,
U. S. Com'r, Distr. of Iowa.

Exhibit A.

United States of America.

No. 107. Special Improvement Bond $500.
of the City of Fort Scott, Kansas.

Know all men by these presents that the city of Fort Scott, in the State of Kansas, for value received, acknowledges itself to owe, and hereby promises to pay to the holder of this bond, on the first day of March, A. D. eighteen hundred and seventy-five at the Fourth National Bank in the city of New [York,] the sum of five hundred dollars, lawful money of the United States of America, with interest thereon at the rate of ten per centum per annum, payable annually at said National Bank, on presentation and surrender of the coupons hereto attached, as they severally become due.

In witness whereof the said city of Fort Scott has caused this bond to be signed by its mayor and attested its clerk, under the corporate seal of the city, this twenty-seventh (27th) day of April, A. D. one thousand eight hundred and seventy-two.

[City of Fort Scott, Kansas.]

F. R. BOYLE, *Mayor.*

Attest: S. KAISER, *City Clerk.*

Copy of certificate endorsed on margin.

Issued in accordance with sections 16 and 17 of an act of the Legislature of the State of Kansas, entitled "An act relating to the powers and government of cities of the second class, and to repeal certain sections of chapter 19 of the general statutes of 1868," approved March 2d, 1871, and in pursuance of an ordinance of the city of Fort Scott, entitled an ordinance ordering the grading, curbing, guttering, and macadamizing a part of Wall street.

Countersigned by the city treasurer, this twenty-seventh day of April, 1872.

W. J. LINN, *City Treasurer.*

Copy of coupon attached to bond:

$50. The city of Fort Scott, Bourbon county, Kansas, on the first day of March, A. D. 1875, will pay the bearer fifty
11 dollars at the Fourth National Bank in the city of New York, on presentation of this coupon, said sum being the annual interest then due on special improvement bond No. 107, for $500.

F. R. BOYLE, *Mayor.*

Attest: S. KAISER, *clerk.*

Copy of Auditor's Certificate, Endorsed upon Bond.

I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued, that the signatures thereto are genuine, and that such bond has been duly registered in my office, in accordance with an act of the legislature entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, or other works of internal improvements, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2d, 1872.

Witness my hand and official seal this 7th day of May, 1872.

[SEAL OF THE AUDITOR OF THE STATE OF KANSAS.]

A. THOMAN, *Auditor of State.*

Endorsed No. 1576. U. S. Circuit Court. Concord Savings Bank *vs.* The City of Fort Scott, Kansas. Petition filed May 23, 1876. A. S. Thomas, clerk. Brown & Campbell.

12 In the Circuit Court of the United States, district of Kansas.

CONCORD SAVINGS BANK
vs.
THE CITY OF FORT SCOTT, KANSAS. } Precipe.

To A. S. Thomas, Esq., *Clerk:*

Issue Summons.

Endorse thereon claim of plaintiff $7,350 on bonds, with interest at 10 per cent. per annum, payable annually on $3,500 from March 1st, 1874, and on balance at like rate from March 1st, 1875 and interest on each annual instalment of interest at seven per cent. per annum from the maturity thereof.

BROWN & CAMPBELL,
Pffs. Attys.

Endorsed: No. 1576. Concord Savings Bank *vs.* The City of Fort Scott. Precipe for summons. Filed May 23, 1876. A. S. Thomas, clerk.

In the Circuit Court of the United States for the District of Kansas.

CONCORD SAVINGS BANK
vs.
THE CITY OF FORT SCOTT, KANSAS. }

We enter ourselves security for costs in said case, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court. And in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it, we hereby agree and stipulate that execution may issue against our property for any costs taxed against it. Dated this 22d day of May, 1876.

13 BROWN & CAMPBELL,
J. D. CAMPBELL.

Endorsed No. 1576, Concord Savings Bank *vs.* The City of Fort Scott. Security for costs, filed May 23, 1876, A. S. Thomas, clerk; approved A. S. Thomas, clerk.

And on this day to wit: May 23, 1876. The clerk of said court issued a writ of summons in said entitled action, which said writ of summons, with the indorsements and marshal's return thereon is in the words and figures following to wit:

Circuit Court of the United States of America, District of Kansas, *ss.*

The United States of America to the Marshal of the District of Kansas, greeting:

You are hereby commanded to notify the City of Fort Scott, Kansas, that it has been sued by Concord Savings Bank in the

circuit court of the United States for the District of Kansas, and that unless it answer by the 22d day of June, A. D. 1876, the petition of the said Concord Savings Bank against it, filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 2d day of June, A. D. 1876.

Witness, the Hon. Morrison R. Waite, Chief Justice of
[SEAL.] the Supreme Court of the United States of America, at Topeka, in said district, this 23rd day of May, A. D. 1876.

A. S. THOMAS, *Clerk.*

Endorsed suit brought for the recovery of money, amount claimed $7,350 on bonds, with interest at 10 per cent per
14 annum, payable annually on $3,500 from March 1st, 1874, and on balance at like rate from March 1, 1875, and interest on each annual instalment of interest at seven per cent. per annum from the maturity thereof.

BROWN & CAMPBELL,
Attorneys for Plaintiff.

No. 1576. Circuit court of the United States, District of Kansas. Concord Savings Bank *vs.* The City of Fort Scott, Kansas. Summons issued May 23, 1876; returnable June 2, 1876. Brown & Campbell, attorneys for plantiff.

U. S. MARSHAL'S RETURN, DISTRICT OF KANSAS, *ss.*

Rec'd this writ May 23d, A. D. 1876, and served same on the within named defendant, "The City of Ft. Scott, Kansas," at Bourbon Co., State and District of Kansas, this 27th day of May, A. D. 1876, by delivering to Charles W. Goodlander, personally, a true and certified copy of this writ, with all the endorsements thereon. He said Charles W. Goodlander being then and there the mayor of said defendant, The City of Ft. Scott, Kansas.

CHAS. H. MILLER, *U. S. Marshal.*
Marshal's fees, $9.50 By C. F. RUCKER, *Deputy.*

Filed June 1, A. D. 1876.

A. S. THOMAS, *Clerk.*

And on this day to wit: June 8, 1876, in the June term, 1876, of said court in the record of the proceedings thereof in said entitled action is the following entry, to wit:

CONCORD SAVINGS BANK,
vs. } 1576
THE CITY OF FORT SCOTT, KANSAS.

It is ordered by the court that this cause be and the same is hereby continued to the next term of this court.

15 And on this day, to wit: June 10, 1876, the defendant, by its attorney, filed in the clerk's office of said court its entry of appearance in said entitled action, which said entry of appearance is in the words and figures following, to wit:

In the circuit court of the United States of America, for the district of Kansas.

CONCORD SAVINGS BANK, Plaintiff,
vs.
THE CITY OF FORT SCOTT, Defendant. } No. 1576.

To the clerk of said court:

You will please enter my appearance in said action as attorney for said defendant, The City of Fort Scott.

J. H. SALLEE.

Endorsed: 1576. Concord Savings Bank *vs.* The City of Fort Scott. Att'y's appearance. Filed June 10, 1876. A. S. Thomas, Clerk. J. H. Sallee, Att'y for Def't.

And on this day, to wit: June 19, 1876, the defendant, by its attorney, filed in the clerk's office of said court, its motion for extension of time to answer, in said entitled action, which said motion is in the words and figures following, to wit:

U. S. Circuit court, district of Kansas.

CONCORD SAVINGS BANK
vs
THE CITY OF FORT SCOTT, Ks.

And now comes the def't, by its attorney, and moves the court that the time for answer in this case may be extended to the first of August, next, for the reason that the time for answer
16 is now about expiring, and the defendant's attorney has not been able yet to obtain a copy of the petition, because of the clerk and his assistants being engaged in the necessary business of the current term, although it applied for the same by letter to Topeka over two weeks ago.

The case is an important one to the city, and it should have a full opportunity to prepare and present its defence.

C. W. BLAIR, *For Def't.*

Endorsed: No. 1576. Concord Savings Bank *vs.* The City of Ft. Scott, Mo., for extension of time to answer to Aug. 1, 1876. Filed June 19, 1876.

A. S. THOMAS, *Clerk.*

And on this day, to wit: June 20, 1876, in the June term, 1876, of said court in the record of the proceedings thereof in said entitled action, is the following entry, to wit:

CONCORD SAVINGS BANK
vs.
THE CITY OF FORT SCOTT, KS. } 1576.

Now comes the defendant by C. W. Blair, its attorney, and on its motion it is ordered by the court that it have until Aug. 1, 1876, to file its answer herein, and that plaintiff's attorney be notified of this order, and that a copy of defendant's answer when filed be immediately forwarded to plaintiff's attorneys.

And on this day, to wit: July 14, 1876, the defendant, by its attorneys, filed in the clerk's office of said court its demurrer to petition in said entitled action, which said demurrer is in the words and figures following, to wit:

In the circuit court of the United States, district of Kansas.

17 CONCORD SAVINGS BANK, Plff.,
vs.
THE CITY OF FORT SCOTT, KANSAS, Deft. } Demurrer.

And now comes the defendant in the above-entitled action, leave of court having been first duly obtained extending the time for answering the petition filed herein, and demurs to the said plaintiff's petition herein for the reason—

1st. That said petition does not state facts sufficient to constitute a cause of action against the defendant.

Wherefore defendant demands judgment against the plaintiff for its costs expended in said action.

J. H. SALLEE,
Atty. for City of Fort Scott.
HULETT & McCLEVERTY,
Of Counsel.

Endorsed: No. 1576. Concord Savings Bank *vs.* The City of Fort Scott. Demurrer. Filed July 14, 1876. A. S. Thomas, clerk. J. H. Sallee, Hulett & McCleverty, defts. attys.

And on this day, to wit, December 2, 1876, in the November Term, 1876, of said court, in the record of the proceedings thereof in said entitled action is the following entry, to wit:

CONCORD SAVINGS BANK
vs.
THE CITY OF FORT SCOTT, KANSAS. } 1576.

Now comes the plaintiff, by Brown & Campbell, its attorneys, and also comes the defendant, by J. H. Sallee, its attorney, and thereupon came on for hearing the defendant's demurrer to plaintiff's petition, which, being argued by counsel and considered by the court, is overruled. And thereupon, on motion of said defendant, leave is given it to answer herein in ninety days from this time, and this cause is continued until the next term.

18 And on this day, to wit, February 26, 1877, the defendant, by its attorneys, filed in the clerk's office of said court its answer in said-entitled action, which said answer is in the words and figures following, to wit:

In the circuit court of the United States for the district of Kansas.

CONCORD SAVINGS BANK, Plff.,
vs.
THE CITY OF FORT SCOTT, KANSAS, Deft. } Answer.

Now comes the said City of Fort Scott, defendant named in the above-entitled action, and for answer to the petition of said plaintiff, and to each and every count thereof, and to each and every cause of action therein set forth, says:

That since April, A. D. 1869, the said defendant has been and still is a city of the second class, organized under an act of the State of Kansas, entitled—

"An act to incorporate cities of the second class,"

Which said act was approved and became a law of said State on the 28th of February, A. D. 1868.

That in March, A. D. 1871, an act of said State was passed, entitled "An act relating to the powers and government of cities of the second class, and to repeal certain sections of chapter 19 of the general statutes of 1868," amending said first-mentioned act, and which was approved and became a law March 2d, 1871.

That under and by virtue of the powers given it in sections 16 and 17 of said act of March 2d, 1871, the defendant enacted an ordinance entitled—

19 "An ordinance ordering the grading, curbing, guttering, and macadamizing of a part of Wall street."

A copy of which said ordinance is hereto attached, marked "Exhit A," and made a part hereof.

That in pursuance to said ordinance and said sections 16 and 17 of said act of March 2d, 1871, the said defendant proceeded to and did grade, curb, gutter, and macadamize that portion of said Wall street, in said city, mentioned and described in said ordinance, and for the payment thereof issued several thousand of dollars worth of the said bonds mentioned in said section 17 of said act of March 2d, 1871, and including the said bonds and coupons set forth and declared upon in plaintiff's petition herein.

And defendant further says that for the purpose of providing the fund required by law for the payment of the said bonds and coupons issued as aforesaid, and also for the payment of the said bonds and coupons herein sued upon by said plaintiff, this defendant proceeded as required in said sections 16 and 17 of said act of March 2d, 1871, to and did levy assessments known as "special assessments for improvements" on all lots and pieces of ground to the centre of the block extending along said Wall street, the

distance so improved as aforesaid, and also did all other acts and things necessary and required of it by law for the collection of said assessments.

That the amount of said assessments so levied as aforesaid was sufficient to pay and liquidate the total amount of said bonds and coupons so issued as aforesaid, including the said bonds and coupons herein sued upon.

20 Defendant further says that as fast as said *said* assessments could be and were collected by said defendant the whole amount so collected was by it paid over to the holders of said bonds and coupons as they became due in payment thereof.

That at the time of the commencement of this action the entire amount of said assessments so collected by this defendant had been by it paid over duly to the holders of said bonds and coupons, and no part or portion thereof was at that time remaining in the possession of said defendant. That defendant has used all the means provided by law for the collection of said assessments and has at all times diligently prosecuted the collection thereof.

That plaintiff and all others had full notice at all times from the face of said bonds and coupons that said defendant was not and is not generally liable thereon, and that the only fund provided by law for the payment thereof is the said assessment above mentioned.

Except as herein admitted this defendant denies each and every allegation in said petition contained, and demands judgment for costs.

HULETT & McCLEVERTY,
and J. H. SALLEE,
Deft's Attys.

Ordinance No. 230,

Entitled an ordinance ordering the grading, curbing, guttering, and macadamizing of a part of Wall street.

Be it ordained by the mayor and councilmen of the city of Fort Scott,

SEC. 1. That Wall street, from the west side of the alley between Ransom and Walker streets to the east side of the

21 alley between Hill and Margrave streets, be, and the same is hereby, ordered and required to be graded, curbed, guttered, and macadamized in accordance with the plan and specifications prepared by the city engineer, and now on file in his office; and the engineer is hereby instructed to advertise not lees than ten days for proposals to do said work.

SEC. 2. All bids received for doing the above specified work, shall be opened at a public meeting of the city council, and such bids as shall be found to be in proper form, shall be entered upon

the minutes of the council, and thereupon the council may, by resolution, award the contract for doing said work to the lowest responsible bidder; and the mayor and city clerk shall be authorized to make and execute a contract on behalf of the city, with the person or persons to whom such contract shall be awarded: *Provided*, That no bid will be received unless accompanied by a bond in the sum of fifteen thousand dollars, with security to be approved by the mayor, and conditioned for the faithful completion of the work within ninety days thereafter, in case the contract therefor shall be awarded upon and in pursuance of such bid.

SEC. 3. The grading, curbing, guttering, ordered in section one of this ordinance, shall be paid for in the bonds *of the bonds* of the city to be registered and classified as "Special Improvement Bonds," said bonds shall be dated the first day of March, 1872, shall be signed by the mayor, attested by the city clerk, under the corporate seal of the city, and countersigned by the city treasurer, and shall be made payable one third in one year, one third in two years, and one third in three years, after the
22 date thereof. They shall bear interest at the rate of ten percentum per annum, payable annually, and shall be paid principal and interest solely from special assessments to be made upon and collected solely from the lots and pieces of ground fronting upon or extending along the street the distance improved, in the manner provided in sections sixteen and seventeen of an act of the Legislature of the State of Kansas, entitled "An act relating to the powers and government of cities of the second class, and to repeal certain sections of chapter 19 of the General Statutes of 1868." Approved March 2d, 1871.

The mayor and clerk shall be authorized to make said bonds payable in the city of New York.

SEC. 4. Any extra work that may be done, which cannot be lawfully paid for in special improvement bonds, shall be paid for in street bonds of the city, said bonds shall be dated the first day of January, 1872, shall be made payable in ten years after the date thereof. They shall be signed by the mayor, attested by the city clerk, under the corporate seal of the city, and countersigned by the city treasurer, and shall bear interest at the rate of ten per centum per annum, payable semi-annually. They shall have interest coupons attached, and may be made payable at such place as will most largely enhance their market value.

SEC. 5. The mayor and city clerk shall be and they are hereby authorized to issue the bonds provided for in this ordinance to contractors from time to time as the work progresses, in sums sufficient to pay ninety per centum of the estimates to be
23 made and furnished by the city engineer: *Provided*, That on the final estimate of said work, the city clerk shall

detach from said bonds, or some of them, coupons, equal in amount to the amount of interest accrued on such of said bonds as shall remain at the expiration of sixty days from and after the awarding of the contract.

SEC. 6. The sidewalks along that part of said street to be improved shall be twelve feet wide inclusive of the curb, and the engineer is hereby instructed to have the curb set at that uniform distance from the line of the street.

SEC. 7. This ordinance shall take effect and be in force from and after its publication in the Fort Scott Daily Monitor.

Published in the Fort Scott Daily Monitor, January 24, 1872.

Approved, January 22, 1872.

(Signed) F. R. BOYLE, *Mayor.*

Attest:

(Signed) T. A. CORBETT, *City Clerk.*

STATE OF KANSAS,
City of Fort Scott, ss:

I, M. Crocker, city clerk of the city of Fort Scott, Bourbon county, Kansas, do hereby certify that the above and foregoing is a true and correct copy of an ordinance of said city, as recorded in the book of ordinances of said city.

In testimony whereof I hereunto set my hand and affix the official seal of said City of Fort Scott, this 23 day of November, A. D. 1876.

[SEAL.] M. CROCKER, *City Clerk.*

24 Endorsed: Official Copy of Ordinance. No. 230. Answer, Endorsed: No. 1576. Concord Savings Bank *vs.* The City of Fort Scott. Answer, filed Febr'y 26, 1877. A. S. Thomas, Clerk. Hulett & McCleverty, Defts. Attys.

And on this day, to wit: March 2, 1877. The plaintiff by its attorneys filed in the clerk's office of said court its demurrer in said entitled action, which said demurrer is in the words and figures following, to wit:

In the circuit court of the United States, district of Kansas.

CONCORD SAVINGS BANK
vs.
THE CITY OF FORT SCOTT, STATE OF KANSAS. } No. 1576. At Law.

The demurrer of the plaintiff to the answer of the defendant.

And now comes the plaintiff and demurs to the answer of the defendant filed herein for that, the same does not state facts sufficient to constitute a defence to the plaintiff's causes of action.

It does not appear that the proceedings have resulted in the satisfaction of the plaintiff's claim upon said bonds and coupons.

Wherefore the plaintiff prays judgment as before.

BROWN & CAMPBELL,
Plffs. Attys.

Endorsed: No. 1576. In U. S. Circuit Court. Concord Savings Bank vs. The City of Fort Scott. Demurrer, Filed March 2, 1877. A. S. Thomas, Clerk. Brown & Campbell.

25 And on this day, to wit: June 6, 1877, the parties hereto, by their attorneys, filed in the clerk's office of said court, their mutual stipulation in said entitled action, which said stipulation is in the words and figures following, to wit:

In the circuit court of the United States, district of Kansas.

THE CONCORD SAVINGS BANK, Plff.,
vs.
THE CITY OF FORT SCOTT, KANSAS, Deft.

It is hereby stipulated and agreed by and between the parties to the above-entitled action to submit the demurrer of plaintiff to defendant's answer with privilege to file written briefs and arguments.

The plaintiff to file his brief and serve copy on defendant within thirty days from this date.

The defendant thirty days thereafter to file its brief and serve copy on plaintiff.

The plaintiff to file brief in reply instanter, copy thereof also to be served on defendant.

Briefs to be filed with clerk of court, and he to forward briefs and papers in the case to Judge Dillon.

Copies of briefs to be served by mail by the parties.

BROWN & CAMPBELL,
Plffs. Attys.
HULETT & McCLEVERTY,
Defts. Attys.

Endorsed: No. 1576. Concord Savings Bank *vs.* City of Fort Scott, Ks. Stipulation. Filed June 6, 1877. A. S. Thomas, Clerk.

26 And on this day, to wit: Tuesday, Dec. 4, 1877, in the November term, 1877, of said court in the record of the proceedings thereof in said entitled action, is the following entry, to-wit:

CONCORD SAVINGS BANK
vs.
THE CITY OF FORT SCOTT } 1576.

And now, December, 1877, it being the November term, 1877, of the said court, this action came on to be heard, on the demurrer filed herein by the plaintiff to the answer of the defendant, the said plaintiff appearing by Brown & Campbell, its attorneys, and the defendant appearing by Hulett & McCleverty, its attorneys, and the court having heard the arguments of counsel, and being fully advised in the premises. And thereupon it is considered by the court, and ordered and adjudged that the said demurrer of the plaintiff to the answer of the defendant be, and the same is hereby, *is hereby* sustained. And the said defendant, now here in open court, electing to stand on the said answer, and refusing to amend the same, it is considered by the court, and further ordered and adjudged that the plaintiff do have and recover of the defendant his damages, now here assessed by the court at the sum of nine thousand six hundred and ninety-eight dollars and thirty-nine cents ($9,698.39,) with interest at the rate of ten per cent. per annum on the sum of seven thousand dollars, and with interest on the sum of two thousand six hundred and ninety-eight dollars and thirty-nine cents ($2,698.39,) at the rate of seven per cent. per annum, together with his costs, taxed at $. And it is further ordered and adjudged that the judgment now here rendered be enforced and collected pur-
27 suant to law in such case made and provided. To which said order and judgment sustaining the plaintiff's demurrer to its answer, and to the judgment of the court, by which the said moneys are recovered against it, the said defendant now here objects and excepts.

JOHN F. DILLON, *Judge.*

29 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy from the record of all the proceedings in the action of Concord Savings Bank *vs.* The City of Fort Scott, Kansas, No. 1576, in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said
[SEAL] district of Kansas, this 18th day of September, A. D. 1878.

A. S. THOMAS, *Clerk.*

Endorsed: No. 1576. Concord Savings Bank *vs.* The City of Fort Scott, Kansas. Transcript.

30 In the circuit court of the United States, district of Kansas.

THE UNITED STATES OF AMERICA EX RELATIONE THE CONCORD SAVINGS BANK
vs.
THE MAYOR and COUNCILMEN of the CITY OF FORT SCOTT, in the State of Kansas.

Transcript.

32 In the circuit court of the United States for the district of Kansas.

THE UNITED STATES OF AMERICA EX RELATIONE THE CONCORD SAVINGS BANK
vs.
THE MAYOR and COUNCILMEN of the CITY OF FORT SCOTT, in the State of Kansas.
2146.

Be it remembered that on this day, to wit, March 6th, 1878, the relator, by its attorneys, filed in the clerk's office of said court its information for mandamus in said entitled action, which said information for mandamus is in the words and figures following, to wit:

In the circuit court of the United States, district of Kansas.

THE UNITED STATES OF AMERICA EX RELATIONE THE CONCORD SAVINGS BANK
vs.
THE MAYOR and COUNCILMEN of the CITY OF FORT SCOTT, in the State of Kansas.
Information.

To the honorable the judges of the circuit of the United States for the district of Kansas.

Your relator, the Concord Savings Bank, represents and shows unto your honors, that it is a corporation organized and existing under the laws of the State of Kansas; that heretofore, to wit, on the 4th day of December, A. D. 1877, by the considera-
33 tion of this honorable court in a certain cause therein heretofore depending, wherein your relator was plaintiff and the City of Fort Scott was defendant, your relator recovered against the said defendant a judgment for the sum of nine thousand six hundred and ninety eight and $\frac{39}{100}$ dollars debt, with interest on the sum of seven thousand dollars at the rate of ten per cent. per annum and on the sum of two thousand six hundred and ninety-eight and $\frac{39}{100}$ dollars at the rate of seven per cent. per annum, and for its costs taxed at $50.10, which said judgment is still wholly unsatisfied and in full force and effect and not in any wise reversed, vacated or superseded; the said judgment being then and there

for so much money then and there due and owing from the said City of Fort Scott to the said plaintiff, your relator, upon divers of the bonds of the said city, theretofore issued by the mayor and council of the said City of Fort Scott, pursuant to the provisions of section 17 of an act of the legislature of the State of Kansas approved March 2, 1871, entitled "An act relating to the powers and government of cities of the second class, and to repeal certain sections of chapter 19 of the general statutes of 1868." Further your relator represents and shows unto your honors that the said City of Fort Scott is and was at the time of the issuing of the said bonds and at the date of the rendition of the said judgment, a corporation organized and existing under the laws of the State of Kansas, for municipal purposes as a city of the second class; that at and upon the issuing of the said bonds, it became and
34 was the duty of the mayor and councilmen composing the city council of the said city to make provision from time to time for a sinking fund to redeem the said bonds at their maturity, and to levy annually taxes on all the taxable property within the said city, in addition to other taxes, and in sufficient amount for the purpose of paying the interest and coupons as they become due on the said bonds and at and upon the recovery of the said judgment to levy and collect and pay over to your relator a tax sufficient for the payment of the said judgment and interest and costs.

Further, your relator represents and shows unto your Honors that heretofore, to wit: on the 21st day of January, A. D. 1878, your relator caused to be served upon John A. Bryant, mayor, and D. D. Daugherty, A. H. Baume, Jr., F. N. Manlove, John S. Bell, M. Lipman, Fred. Schultz, Wm. H. Bain and J. D. Mead, councilmen, the paper writing hereto attached and made part hereof, reciting the premises, and demanding that they immediately proceed to levy, collect, and pay over to your relator taxes upon all the taxable property within the city of Fort Scott sufficient to pay the debt, interest and costs, of the above-recited judgment, the said persons then and there composing the city council of the city of Fort Scott aforesaid, and that the said mayor and councilmen composing the city of Fort Scott have hitherto neglected and refused to perform their said duty, and to levy
35 and collect the said taxes.

Wherefore, and inasmuch as your relator is without a plain and adequate remedy in the ordinary course of the law, he prays your Honors that the writ of mandamus of this honorable court may issue in due form, commanding the performance of the said duties by the said mayor and councilmen.

And it will ever pray, &c.

THE CONCORD SAVINGS BANK.
By BROWN & CAMPBELL,
Its Attorneys.

To the mayor and council of the city of Fort Scott, in the State Kansas.

GENTLEMEN: You are hereby notified that on the 4th day of December, 1877, the Concord Savings Bank recovered a judgment in the circuit court of the United States for the district of Kansas against the city of Fort Scott for the sum of $9,689.39, with interest at the rate of 10 per cent. per annum on the sum of $7,000, and on the balance of said judgment at the rate of 7 per cent per annum, and the costs of said suit, being $———; that the said judgment is founded upon fourteen (14) bonds of the sum of $500 each, bearing date 27th of April, A. D. 1872, purporting by recital to have been issued in accordance with sections 16 and 17 of the act of the Legislature of the State of Kansas entitled "An act relating to the powers and government of cities the second class," etc., and "to repeal certain sections of chapter 19 of the general statutes of 1868," and in pursuance of
36 an ordinance of the city of Fort Scott entitled "Ordinance for the grading, guttering, and macadamizing of part of Wall street."

That by virtue and in pursuance of section 22, chapter 62 of of the said act of March 22, 1871, it was your duty to levy and collect taxes on all the taxable property within the city of Fort Scott, in addition to other taxes, and in sufficient amount for the purpose of paying the interest and the coupons as they became due, upon said bonds; that in pursuance of section 21 of said act, it was your duty to make provision from time to time for a sinking fund to redeem, at the maturity thereof, the principal of said bonds.

Now we demand of you that you immediately proceed to levy and collect and pay over to the said Concord Savings Bank taxes on all the taxable property within the city of Fort Scott sufficient to pay the debt, interest, and costs of the above recited judgment.

CONCORD SAVINGS BANK.
By BROWN & CAMPBELL,
Its Attorneys.

Due legal service of the within demand is hereby admitted by the mayor and council of the city of Fort Scott. Dated at Fort Scott, State of Kansas, this 21 day of January, 1878.

JOHN A. BRYANT,
Mayor.

A. H. BOURNE, Per C.	D. D. DAUGHERTY.
F. N. MANLOVE.	M. LIPMAN.
JOHN S. BELL.	FRED. SCHULTZ.
WM. H. BAIR.	J. D. MEAD.

37 Demand endorsed: In U. S. Circuit Court. Concord Savings Bank vs. The City of Fort Scott. Demand. Brown & Campbell.

Information endorsed: No. 2146. United States Circuit Court. The United States of America Ex Relatione, The Concord Savings Bank vs. The Mayor and Councilmen of the City of Fort Scott. Information for Mandamus, Filed March 6, 1878. A. S. Thomas, Clerk. Brown & Campbell.

And on this day, to wit: Tuesday, April 9th, 1878, in the November term, A. D. 1877, of said court, in the record of the proceedings thereof in said entitled action is the following entry, to wit:

THE UNITED STATES OF AMERICA EX REL. THE CONCORD SAVINGS BANK
vs.
THE MAYOR AND COUNCILMEN OF THE CITY OF FORT SCOTT. } 2146.

Circuit Court of the United States of America, District of Kansas. The United States of America, to the Mayor and Councilmen of the city of Fort Scott, in the State of Kansas:

Whereas by the consideration of the honorable the circuit court of the United States for the district of Kansas, in a certain action then therein depending, wherein the Concord Savings Bank was plaintiff and The City of Fort Scott, in the State of Kansas, was defendant, the said plaintiff did, on the fourth
38 day of December, A. D. 1877, recover of and against the said defendant the sum of nine thousand six hundred and ninety-eight dollars and thirty-nine cents, damages with interest on the sum of seven thousand dollars thereof, from the date of the said judgment, at the rate of ten per cent. per annum, and on the sum of two thousand six hundred and ninety-eight dollars and thirty-nine cents at the rate of seven per cent. per annum, and the further sum or fifty dollars and ten cents costs; the said damages being for so much money then and there due and owing to the said plaintiff from the said defendant, for the principal and interest of divers of the bonds of the city of Fort Scott theretofore issued by the mayor and council of the said city, pursuant to the provisions of section 17 of an act of the Legislature of the State of Kansas approved March 2, 1871, entitled "An act relating to the powers and Government of cities of the second class, and to repeal certain sections of chapter 19 of the general statutes of 1868;" the said judgment being now in full force and effect, and in no wise modified, vacated, superseded, or reversed, all of which will more fully appear from the record thereof, still remaining in our said circuit court.

And whereas by the terms of the said act, and by the provisions of the laws of the said State of Kansas in such case made and provided, at and after the issuance of the said bonds it be-

came and was the duty of the said mayor and councilmen of the said city of Fort Scott, composing the city council of the said city, under and by virtue of the provisions of the laws of
39 the State of Kansas in such case made and provided, to make provision from time to time for a sinking fund to redeem the said bonds at the maturity thereof, and to levy annually taxes on all the taxable property within the said city in addition to other taxes, and in sufficient amount, for the purpose of paying the interest and coupons as they become due on the said bonds, and at and upon the rendition of the said judgment to levy, collect, and pay over to the said plaintiff therein a tax sufficient upon all the taxable property within the said city for the payment of the said judgment, interest and costs.

And whereas after the rendition of the said judgment the said Concord Savings Bank demanded of the said mayor and councilmen of the city of Fort Scott that they proceed to levy and collect a tax on all the taxable property within the said city of Fort Scott sufficient to pay the said judgment and interest and cost, in conformity with the provisions of the statutes aforesaid, in such case made and provided.

And whereas it hath been made to appear unto our said circuit court, on the relation of the said Concord Savings Bank, that you, the said mayor and councilmen, composing the city council of the said city of Fort Scott, in the State of Kansas, notwithstanding the premises, have neglected and refused to levy and collect the tax aforesaid, and that the said relator hath no
40 plain or adequate remedy in the premises according to the ordinary course of the law.

Now, therefore, we being willing that full and speedy justice should be done in the premises, an order for the allowance of this writ having been first duly made by and entered in our said circuit court, do command you that you, the mayor and councilmen composing the city council of the said city of Fort Scott, do levy and collect a sufficient tax upon all the taxable property within the said city of Fort Scott to pay the above recited judgment and interest and costs, and that you cause the said moneys to be paid over to the said Concord Savings Bank upon the said judgment, or that you show cause before our said circuit court, at the next term thereof, to be held at Leavenworth, in the said district, on the first Monday of June, A. D. 1878, why you have not done so, and that you have then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, with the seal
[SEAL] of our said circuit court at Topeka, in said district, this 9th day of April, A. D. 1878.

A. S. THOMAS, *Clerk.*

And now, on this 9th day of April, A. D. 1878, being at the November [term] (1877) of the circuit of the United States for the district of Kansas, it is, on the motion of Brown & Campbell, attorneys for the said relator, considered by the said
41 court, and ordered that the within writ be, and the same be and the same is hereby allowed, and that this order, together with the said writ be spread upon the records of the said court in the said cause.

C. G. FOSTER, *Judge.*

And on this day, to wit: May 11th, 1878, there was filed in the clerk's office of said court, copy of writ of mandamus in said entitled action, which said copy of writ of mandamus, with the endorsements and marshal's return thereon, is in the words and figures following, to wit:

Circuit Court of the United States of America, district of Kansas.

The United States of America, to the Mayor and Councilmen of the City of Fort Scott, in the State of Kansas.

Whereas, by the consideration of the honorable the circuit court of the United States for the district of Kansas in a certain action then therein depending, wherein the Concord Savings Bank was plaintiff and the City of Fort Scott, in the State of Kansas, was defendant, the said plaintiff did, on the fourth day of December, A. D. 1877, recover of and against the said defendant the sum of nine thousand six hundred and ninety-eight dollars and thirty-nine cents damages, with interest on the sum of seven thousand dollars thereof from the date of the said
42 judgment at the rate of ten per cent. per annum, and on the sum of two thousand six hundred and ninety-eight dollars and thirty-nine cents at the rate of seven per cent. per annum, and the further sum of fifty dollars and ten cents costs; the said damages being for so much money then and there due and owing to the said plaintiff from the said defendant for the principal and interest of divers of the bonds of the City of Fort Scott theretofore issued by the mayor and council of the said city, pursuant to the provisions of section 17 of an act of the legislature of the State of Kansas approved March 2, 1871, entitled "An act relating to the powers and government of cities of the second class, and to repeal certain sections of chapter nineteen of the general statutes of 1868," the said judgment being now in full force and effect, and in no wise modified, vacated, superseded, or reversed, all of which will more fully appear from the record thereof still remaining in our said circuit court.

And whereas by the terms of the said act and by the provisions of the laws of the said State of Kansas in such case made and provided, at and after the issuance of said bonds, it became and

was the duty of the said mayor and councilmen of the said City of Fort Scott, composing the city council of the said city, under and by virtue of the provisions of the laws of the State of Kansas in such case made and provided, to make provision from
43 time to time for a sinking fund to redeem the said bonds at the maturity thereof, and to levy annually taxes on all the taxable property within the said city, in addition to other taxes, and in sufficient amount, for the purpose of paying the interest and coupons as they become due on the said bonds, and at and upon the rendition of the said judgment to levy, collect, and pay over to the said plaintiff therein a tax sufficient upon all the taxable property within the said city for the payment of the said judgment, interest, and costs.

And whereas, after the rendition of the said judgment, the said Concord Savings Bank demanded of the said mayor and councilmen of the City of Fort Scott that they proceed to levy and collect a tax on all the taxable property within the said City of Fort Scott sufficient to pay the said judgment and interest and costs, in conformity with the provisions of the statutes aforesaid in such case made and provided.

And whereas it hath been made to appear unto our said circuit court, on the relation of the said Concord Savings Bank, that you the said mayor and councilmen composing the city council of the said City of Fort Scott, in the State of Kansas, notwithstanding the premises, have neglected and refused to levy and collect the tax aforesaid, and that the said relator hath no plain or adequate remedy in the premises according to the ordinary course of the law.

44 Now therefore we being willing that full and speedy justice should be done in the premises, an order for the allowance of this writ having been first duly made by and entered in our said circuit court, do command you, that you, the mayor and councilmen composing the city council of the said city of Fort Scott, do levy and collect a sufficient tax upon all the taxable property within the said city of Fort Scott to pay the above recited judgment, and interest and costs, and that you cause the said moneys to be paid over to the said Concord Savings Bank, upon the said judgment, or that you show cause before our said circuit court, at the next term thereof, to be held at Leavenworth, in the said district, on the first Monday of June, A. D. 1878, why you have not done so, and that you have then and there this writ.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, with the seal of our said circuit court at Topeka, in said district, this 9th day of April, A. D. 1878.

[SEAL OF SAID COURT.]

A. S. THOMAS, *Clerk.*

And now, on this 9th day of April, A. D. 1878, being at the November [term] (1877) of the circuit court of the United States for the district of Kansas, it is on the motion of Brown and Campbell, attorneys for the said relator, considered by the said
45 court, and ordered that the within writ be, and the same be, and the same is hereby allowed, and that this order, together with the said writ, be spread upon the records of the said court in the said cause.

C. G. FOSTER, *Judge.*

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, B. F. Simpson, marshal of the United States for the district of Kansas, do hereby certify the within and foregoing to be a full, true, and perfect copy of the original alternative mandamus and allocator now in my possession, with all endorsements thereon.

B. F. SIMPSON,
U. S. Marshal, District of Kansas.

U. S. Marshal's Return.

DISTRICT OF KANSAS, *ss:*

Rec'd the original writ of mandamus, of which the hereto attached and foregoing is a true and perfect copy, on the 25th day of April, 1878, and I certify that I served the same on the within named defendants, "The Mayor and Councilmen of the city of Fort Scott, in the State of Kansas," on the 7th day of May, A. D. 1878, at Bourbon county, State and district of Kansas, by delivering to J. P. Robins, F. N. Manlove, John Perry, C. H. Boyle, J. S. Bell, Wm. H. Bair, Morris Lipman, and J. D. Mead, each of them personally, a true and certified copy of said original writ of mandamus, with all the endorsements thereon. They,
46 the said J. P. Robins, F. N. Manlove, John Perry, C. H. Boyle, J. S. Bell, Wm. H. Bair, Morris Lipman, and J. D. Mead, being then and there the councilmen of the city of Fort Scott, in the State of Kansas, I did also, at the same time and place, exhibit to each of said councilmen the said original writ of mandamus, with the seal of this honorable court thereto affixed. I did afterwards, to wit on the same day, deliver the said original writ of mandamus to M. Cohn, he, said M. Cohn, being then and there the mayor of the city of Fort Scott, in the State of Kansas. I further return that the said writ of mandamus was served upon said mayor and councilmen of the city of Fort Scott, in the State of Kansas, while they, the said mayor and councilmen, were in session.

B. F. SIMPSON,
Marshal District of Kansas.

Marshal's Fees, 37.90.

Endorsed: No. 2146. The United States Circuit Court. United States *ex rel* Concord Savings Bank *vs.* The Mayor and Councilmen of the City of Fort Scott. Alternative mandamus and allocator. Filed May 11, 1878. A. S. Thomas, clerk. Brown & Campbell.

47 And on this day, to wit: June 4th, 1878, the respondents, by their attorneys, filed in the clerk's office of said court their return to alternative writ of mandamus, which said return, with the exhibits thereto attached and endorsements thereon, is in the words and figures following, to wit:

In the circuit court of the United States, district of Kansas.

THE UNITED STATES OF AMERICA *ex relatione* THE CONCORD SAVINGS BANK, *vs.* THE MAYOR AND COUNCILMEN OF THE CITY OF FORT SCOTT, in the State of Kansas. } Return to alternative writ of mandamus.

To the honorable the judges of the circuit court of the United States for the district of Kansas.

The respondents, the said mayor and councilmen of the city of Fort Scott, Kansas, jointly and severally answering to the alternative writ of mandamus, make this return thereto, and inform the court and aver:

That the relator, the Concord Savings Bank, did, on the 4th day of December, A. D. 1877, by the consideration of said court, recover a judgment against the said the City of Fort Scott, Kansas, in an action then pending in said court, wherein the said the Concord Savings Bank was plaintiff, and the said the City

48 of Fort Scott, Kansas, was defendant.

And these respondents admit that said judgment was for the sum of nine thousand six hundred and ninety-eight and $\frac{39}{100}$ dollars, with interest upon seven thousand dollars thereof at the rate of ten per cent. per annum, and with interest upon two thousand six hundred and ninety-eight and $\frac{39}{100}$ dollars thereof at the rate of seven per cent. per annum.

But these respondents deny that said judgment was for so much money then and there due from the said The City of Fort Scott, Kansas, to the said relator, but aver that said judgment was special and limited, and fixing the amount due to said relator upon certain "special improvement bonds" of the said The City of Fort Scott, Kansas, issued under and by virtue of sections 16 and 17 of an act of the State of Kansas, entitled:

"An act relating to the powers and government of cities of the second-class, and to repeal certain sections of chapter 19 of the general statutes of 1868." Approved March 2nd, 1871, and of an ordinance of the said city of Fort Scott, Kansas, entitled:

"An ordinance ordering the grading, curbing, guttering, and macadamizing a part of Wall street," which said bonds each contained a recital upon their face in words and figures as follows, to wit:

"Issued in accordance with sections 16 and 17 of an act
49 of the legislature of the State of Kansas, entitled, an act relating to the powers and government of cities of the second-class, and to repeal certain sections of chapter 19 of the general statutes of 1868. Approved March 2nd, 1871, and in pursuance of an ordinance of the city of Fort Scott, entitled an ordinance ordering the grading, curbing, guttering, and macadamizing of a part of Wall street.

"Countersigned by the city treasurer, this twenty-seventh day of April, 1872.

"W. I. LINN,
"*City Treasurer.*"

A copy of one of said bonds and coupons, with the recitals thereon, is hereto attached, marked "A," and made a part hereof. All of said bonds, coupons and recitals, are similar in tenor and effect to said copy above recited.

A certified copy of which said judgment is also hereto attached, marked "B," and made a part hereof.

A certified copy of the said ordinance above referred to under which said "special improvement bonds" were issued, is also hereto attached, marked "C," and made a part hereof.

And these respondents deny that said judgment was for any other or different indebtedness than as herein admitted and alleged.

These respondents admit that the said The City of Fort Scott, Kansas, was at and before the time of the issuing of the "special improvement bonds" above recited, and has been at all times since, and still is a city of the second-class, existing under
50 the laws of the State of Kansas for municipal purposes.

These respondent admit that on the 21st day of January, A. D. 1878, the said relator caused a demand in writing to be served upon each and every of the then mayor and councilmen of said city of Fort Scott, Kansas, demanding that John A. Bryant, the then mayor; and D. D. Daugherty, A. H. Bourne, Jr., F. N. Manlove, John S. Bell, M. Lipman, Fred. Schultz, Wm. H. Bair, and J. D. Mead, the then councilmen of the said The City of Fort Scott, Kansas, proceed immediately to levy, collect, and pay over to said relator, taxes upon all the taxable property within the city of Fort Scott, Kansas, sufficient to pay the said judgment above recited, together with interest and costs, a copy of which said demand is hereto attached marked "D," and made a part hereof.

And these respondents deny that *that* any other or different demand than the one above recited has at any time been served upon said respondents by said relator.

These respondents admit that they have hitherto refused and neglected, and still do neglect and refuse to levy, collect, and pay over to the said relator taxes upon all the taxable property within the said The City of Fort Scott, Kansas, sufficient to pay said judgment above recited or any part thereof, and they deny that it is the duty of the said The City of Fort Scott, Kansas, to levy or collect any general tax or any tax whatever upon all the
51 taxable property within the said The City of Fort Scott, Kansas, sufficient to pay said judgment or any part thereof, and deny that it ever became or was the duty of the mayor and councilmen composing the city council of the said The City of Fort Scott, Kansas, to make provisions from time to time for a sinking fund to redeem the said "Special Improvement Bonds" above referred to, or any part thereof at their maturity, or to levy annually taxes on all the taxable property within the said The City of Fort Scott, Kansas, in addition to other taxes and sufficient in amount for the purpose of paying the interest and coupons as have become due upon said "special improvement bonds," or to levy any taxes whatever upon all the taxable property within the said city for the purpose of paying said interest and coupons, or any part thereof, or to make provision for any sinking fund whatever to redeem said "special improvement bonds," or any part thereof, at their maturity.

And these respondents aver that the whole and only duty of the said The City of Fort Scott, Kansas, and the mayor and councilmen composing the council of said city and of these respondents, with respect to the payment of said "special improvement bonds," with interest and coupons, was to cause that assessments be levied and made on all lots and pieces of ground to the centre of the block, extending along the street or avenue the distance improved or to be improved, according to the assessed
52 value of the lots or pieces of ground without regard to the buildings or improvements thereon, which said assessments should be sufficient in amount to pay the principal and interest of said "special improvement bonds" issued under said sections 16 and 17 of said act above referred to, which said assessments were payable annually in three equal payments, in amount to principal and interest of any of such bonds accruing during each fiscal year, and to require that such taxes and assessments, when levied and assessed as provided for in said sections 16 and 17 of said act above referred to, should be certified by the city clerk of said city of Fort Scott, Kansas, to the county clerk of the county in which said city was located, and placed upon the tax roll of said county for collection, subject to the same penalties, and collected in like manner, as other taxes.

And respondents aver that before the maturity of any of said bonds issued under the said ordinance above recited, the said, The City of Fort Scott, Kansas, by its proper authorities, did levy and cause to be made the said assessments provided for in the said sections 16 and 17 of the said act above referred to, upon all lots and pieces of ground to the centre of the block extending along the street the distance improved and ordered to be improved, under and by virtue of said ordinance above recited, which said assessment was sufficient in amount to pay the full amount
53 of such "special improvement bonds," with interest and coupons thereon so issued under said ordinance as the same should mature and become due, and cause the same to be certified by said city clerk, of said city of Fort Scott, to said county clerk and placed upon said tax-roll for collection, and did all other acts and duties required by law for the levy and collection of said assessments and for the payment of said bonds, with interest and coupons, including the said bonds and coupons upon which said judgment above recited was obtained. That all amount so collected have been promptly paid over by said city to the holders of said bonds, and no part thereof remained on hand at the time of the institution of proceedings herein by said relators.

That these respondents have at all times used, still are using and intend and are willing to use all lawful means for the collection of said assessments so made as aforesaid, and for the payment of said judgment, interest, and costs in the manner provided by law.

Respondents further aver that at the time of the service of the alternative writ of mandamus herein the term of office of John A. Bryant of said city as mayor had expired, as also the terms of office of D. D. Daugherty, A. H. Bourne, Jr., and Fred.
54 Schultz as councilmen of said City of Fort Scott, Kansas.

That at the date of the service of said alternative writ of mandamus herein M. Cohen was mayor of said City of Fort Scott, Kansas, and J. P. Robens, F. N. Manlove, John Perry, C. H. Boyle, J. S. Bell, Wm. H. Bair, Morris Liepman, and J. D. Mead were councilmen of said city.

Respondents having made full return and answer herein, ask to be discharged.

HULETT & McCLEVERTY,
For Respondents.

"*Exhibit A.*"

No. 107. United States of America. $500.

Special Improvement Bond
of the City of Fort Scott, Kansas.

Know all men by these presents that the city of Fort Scott, in the State of Kansas, for value received, acknowledges itself

judgment now here rendered be enforced and collected pursuant to law in such case made and provided. To which said order and judgment sustaining the plaintiff's demurrer to its answer, and to the judgment of the court, by which the said moneys are recovered against it, the said defendant now here objects and excepts.

JOHN F. DILLON, *Judge.*

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full and perfect copy from the record of the proceedings in the action of the Concord Savings Bank *vs.* The City of Fort Scott, No. 1576 in said court.

In testimony whereof, I have hereunto set my hand and
59 affixed the seal of said court at my office in Topeka, in said district of Kansas, this 15th day of December, A.
SEAL. D. 1877.

A. S. THOMAS, *Clerk.*

"*Exhibit C.*"

Ordinance No. 230, entitled an ordinance ordering the grading, curbing, guttering and macadamizing of a part of Wall street.

Be it ordered by the mayor and councilmen of the City of Fort Scott—

SEC. 1. That Wall street, from the west side of the alley between Ransom and Walker streets, to the east side of the alley between Hill and Margrave streets, be and the same is hereby ordered and required to be graded, curbed, guttered and macadamized in accordance with the plan and specifications prepared by the city engineer and now on file in his office, and the engineer is hereby instructed to advertise not less than ten days for proposals to do said work.

SEC. 2. All bids received for doing the above specified work shall be opened at a public meeting of the city council, and such bids as shall be found to be in proper form shall be entered upon the minutes of the council, and thereupon the council may by
60 resolution award the contract for doing said work to the lowest responsible bidder; and the mayor and city clerk shall be authorized to make and execute a contract in behalf of the city, with the person or persons to whom such contract shall be awarded: *Provided*, That no bid will be received unless accompanied by a bond in the sum of fifteen thousand dollars, with security, to be approved by the mayor, and conditioned for the faithful completion of the work within ninety days thereafter, in case the contract therefor shall be awarded upon and in pursuance of such bid.

SEC. 3. The grading, curbing, guttering ordered in section one of this ordinance, shall be paid for in the bonds of the city, to be registered and classified as special improvement bonds, said bonds shall be dated the first day of March, 1872, shall be signed by the mayor, attested by the city clerk under the corporate seal of the city, and countersigned by the city treasurer, and shall be made payable one-third in one year, one-third in two years, and one-third in three years after the date thereof. They shall bear interest at the rate of ten per centum per annum, payable annually, and shall be paid principal and interest solely from special assessments to be made upon and collected solely from the lots and pieces of ground fronting upon or extending along the street the distance improved in the manner provided in sections sixteen and seventeen of an act of the legislature of the
61 State of Kansas entitled an act relating to the powers and government of cities of the second-class, and to repeal certain sections of chapter 19 of the general statutes of 1868. Approved March 2nd, 1871. The mayor and clerk shall be authorized to make said bonds payable in the city of New York.

SEC. 4. Any extra work that may be done which cannot be lawfully paid for in special improvement bonds shall be paid for in street bonds of the city. Said bonds shall be dated the first day of January, 1872, and shall be made payable ten years after the date thereof.

They shall be signed by the mayor, attested by the city clerk under the corporate seal of the city, and countersigned by the city treasurer, and shall bear interest at the rate of ten per centum per annum, payable semi-annually.

They shall have interest coupons attached, and may be made payable at such place as will most largely enhance their market value.

SEC. 5. The mayor and city clerk shall be, and they are hereby, authorized to issue the bonds provided for in this ordinance to contractors from time to time, as the work progresses, in sums sufficient to pay ninety per centum of the estimates to he made and furnished by the city engineer: provided, that on the final estimate of said work the city clerk shall detach from said bonds or some of them coupons equal in amount to the amount of interest accrued on such of said bonds as shall remain unissued at the expiration of sixty days from after the awarding of the
62 contract.

SEC. 6. The sidewalks along that part of said street to be improved shall be twelve feet wide, inclusive of the curb, and the engineer is hereby instructed to have the curb set at that uniform distance from the line of the street.

SEC. 7. This ordinance shall take effect and be in force from and after its publication in the Fort Scott Daily Monitor.

Published in the Fort Scott Daily Monitor, January 24, 1872.
Approved January 22, 1872.

(Signed) F. R. BOYLE, *Mayor.*

Attest: (Signed) T. A. CORBETT, *City Clerk.*

The above and foregoing is a correct and true copy of an ordinance of the City of Fort Scott, as recorded upon the book of ordinances.

In testimony whereof, I hereto set my hand and affix the
SEAL. seal of the city, this 15th day of April, 1878.

M. CROCKER, *City Clerk.*

63 "*Exhibit D.*"

To the mayor and council of the city of Fort Scott, in the State Kansas.

GENTLEMEN: You are hereby notified that on the 4th day of December, 1877, the Concord Savings Bank recovered a judgment in the circuit court of the United States for the district of Kansas against the city of Fort Scott for the sum of $9,689.39, with interest at the rate of 10 per cent. per annum on the sum of $7,000, and on the balance of said judgment at the rate of 7 per cent per annum, and the costs of said suit, being $———; that the said judgment is founded upon fourteen (14) bonds of the sum of $500 each, bearing date 27th of April, A. D. 1872, purporting by recital to have been issued in accordance with sections 16 and 17 of the act of the Legislature of the State of Kansas entitled "An act relating to the powers and government of cities the second class," etc., and "to repeal certain sections of chapter 19 of the general statutes of 1868," and in pursuance of an ordinance of the city of Fort Scott entitled "An ordinance for the grading, guttering, and macadamizing of part of Wall street."

That by virtue and in pursuance of section 22, chapter 62 of the said act of March 2d, 1871, it was your duty to levy and collect taxes on all the taxable property within the city of
64 Fort Scott, in addition [to] other taxes, and in sufficient amount for the purpose of paying the interest and the coupons as they became due, upon said bonds; that in pursuance of section 21 of said act, it was your duty to make provision from time to time for a sinking fund to redeem, at the maturity thereof, the principal of said bonds.

Now we demand of you that you immediately proceed to levy and collect and pay over to the said Concord Savings Bank taxes on all the taxable property within the city of Fort Scott sufficient to pay the debt, interest, and costs of the above recited judgment.

CONCORD SAVINGS BANK.
By BROWN & CAMPBELL,
Its Attorneys.

Due legal service of the within demand is hereby admitted by the mayor and council of the city of Fort Scott.

Dated at Fort Scott, State of Kansas, this 21 day of January, 1878.

JOHN A. BRYANT,
Mayor.

A. H. BOURNE, Per C.	FRED. SCHULTZ.
F. N. MANLOVE.	WM. H. BAIR.
JOHN S. BELL.	J. D. MEAD.
M. LIEPMAN.	

65 Circuit Court of the United States of America, District of Kansas. The United States of America, to the Mayor and Councilmen of the city of Fort Scott, in the State of Kansas:

Whereas by the consideration of the honorable the circuit court of the United States for the district of Kansas, in a certain action then therein depending, wherein the Concord Savings Bank was plaintiff and The City of Fort Scott, in the State of Kansas, was defendant, the said plaintiff did, on the fourth day of December, A. D. 1877, recover of and against the said defendant the sum of nine thousand six hundred and ninety-eight dollars and thirty-nine cents, damages with interest on the sum of seven thousand dollars thereof, from the date of the said judgment, at the rate of ten per cent. per annum, and on the sum of two thousand six hundred and ninety-eight dollars and thirty-nine cents at the rate of seven per cent. per annum, and the further sum or fifty dollars and ten cents costs; the said damages being for so much money then and there due and owing to the said plaintiff from the said defendant, for the principal and interest of divers of the bonds of the city of Fort Scott theretofore issued by the mayor and council of the said city, pursuant to the provisions of section 17 of an act of the Legislature of the State of Kansas approved March 2, 1871, entitled "An act relating to the powers and Government of cities of the second class, and to repeal certain sections of chapter 19 of the general
66 statutes of 1868;" the said judgment being now in full force and effect, and in no wise modified, vacated, superseded, or reversed, all of which will more fully appear from the record thereof, still remaining in our said circuit court.

And whereas by the terms of the said act, and by the provisions of the laws of the said State of Kansas in such case made and provided, at and after the issuance of the said bonds it became and was the duty of the said mayor and councilmen of the said city of Fort Scott, composing the city council of the said city, under and by virtue of the provisions of the laws of the State of Kansas in such case made and provided, to

make provision from time to time for a sinking fund to redeem the said bonds at the maturity thereof, and to levy annually taxes on all the taxable property within the said city in addition to other taxes, and in sufficient amount, for the purpose of paying the interest and coupons as they become due on the said bonds, and at and upon the rendition of the said judgment to levy, collect, and pay over to the said plaintiff therein a tax sufficient upon all the taxable property within the said city for the payment of the said judgment, interest and costs.

And whereas after the rendition of the said judgment the said Concord Savings Bank demanded of the said mayor and councilmen of the city of Fort Scott that they proceed to levy
67 and collect a tax on all the taxable property within the said city of Fort Scott sufficient to pay the said judgment and interest and costs, in conformity with the provisions of the statutes aforesaid, in such case made and provided.

And whereas it hath been made to appear unto our said circuit court, on the relation of the said Concord Savings Bank, that you, the said mayor and councilmen, composing the city council of the said city of Fort Scott, in the State of Kansas, notwithstanding the premises, have neglected and refused to levy and collect the tax aforesaid, and that the said relator hath no plain or adequate remedy in the premises according to the ordinary course of the law.

Now, therefore, we being willing that full and speedy justice should be done in the premises, an order for the allowance of this writ having been first duly made by and entered in our said circuit court, do command you that you, the mayor and councilmen composing the city council of the said city of Fort Scott, do levy and collect a sufficient tax upon all the taxable property within the said city of Fort Scott to pay the above recited judgment and interest and costs, and that you cause the said moneys to be paid over to the said Concord Savings Bank upon the said judgment, or that you show cause before our said circuit court, at the next term thereof, to be held at Leavenworth, in the said dis-
68 trict, on the first Monday of June, A. D. 1878, why you have not done so, and that you have then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, with the seal
[SEAL] of our said circuit court at Topeka, in said district, this 9th day of April, A. D. 1878.

A. S. THOMAS, *Clerk.*

And now, on this 9th day of April, A. D. 1878, being at the November [term] (1877) of the circuit court of the United States for the district of Kansas, it is, on the motion of Brown & Camp-

bell, attorneys for the said relator, considered by the said court, and ordered that the within writ be, and the same be and the same is hereby allowed, and that this order, together with the said writ be spread upon the records of the said court in the said cause.

C. G. FOSTER, *Judge.*

Endorsed: No. 2146. In United States Circuit Court, United States *ex rel.*, Concord Savings Bank *vs.* The Mayor and Councilmen of the City of Fort Scott. Alternative mandamus and allocatur filed June 4, 1878. A. S. Thomas, clerk. By J. N. Strickler, deputy. Brown & Campbell.

69 And on this day to wit: June 6, 1878, the relator by its attorneys filed in the clerk's office of said court its demurrer to the defendant's return in said entitled action, which said demurrer is in the words and figures following to wit:

U. S. EX REL., CONCORD SAVINGS BANK,
vs.
THE MAYOR ET AL., CITY OF FORT SCOTT. } No. 2146.

The relator demurs to the return herein, and says the same is not sufficient in law.

The debt was the absolute and unconditional debt of the def't.

The judg't was absolute against the def't.

BROWN & CAMPBELL,
For Relator.

Endorsed: No. 2146. U. S. *ex rel.*, Concord Savings [Bank] *vs.* [The City of] Fort Scott. Demurrer. Filed June 6, 1878. A. S.Thomas, clerk. By J. N. Strickler, deputy.

And on this day to wit: Wednesday, June 12th, 1878, at the June, A. D. 1878, term of said court in the record of the proceedings thereof in said entitled action is the following entry to wit:

THE UNITED STATES OF AMERICA, EX REL.
The Concord Savings bank.
vs.
THE MAYOR AND COUNCILMEN OF THE CITY OF FORT SCOTT, in the State of Kansas } 2146.

70 Now comes the relator herein, by Brown & Campbell, its attorneys, and also the respondents, by Hulett & McCleverty, their attorneys, and thereupon the demurrer of the relator to the answer and return of the respondents to the alternative writ of mandamus herein, came on to be heard, and was argued by counsel, on consideration whereof, and of the premises, it is ordered by the court that said demurrer be, and the same is hereby, overruled and denied, and it appearing to the court that

the alternative writ of mandamus herein was defective in that it commanded the levy of a general tax upon all the taxable property within the city of Fort Scott, Kansas, when said relator is only entitled to a levy of special assessments upon the property benefited and improved, as provided by law in such cases, thereupon it is further ordered that said alternative writ be, and the same is hereby, quashed, set aside, and held for naught, and the relator's information herein dismissed.

It is therefore ~~not~~ by the court here considered, ordered, and adjudged that the respondents go hence without day, and have and recover of and from the relator, The Concord Savings Bank, their costs herein expended, and that execution issue therefor.

To which ruling and decision of the court the relator now here excepts.

72 And on this day, to wit September 5, 1878, the relator, by its attorneys, filed in the clerk's office of said court its appeal bond in said entitled action; which said appeal bond is in the words and figures following, to wit:

Know all men by these presents, that we, The Concord Savings Bank, a corporation organized under the laws of the State of New Hampshire, as principal, and Thomas Stuart and George Jones, of the county of Merrimack, in the State of New Hampshire, as sureties, are held and firmly bound unto the mayor and councilmen of the city of Fort Scott, in the State of Kansas, a municipal corporation organized and existing under the laws of the State of Kansas, in the full and just sum of one thousand dollars, ($1,000,) to be paid to the said the mayor and councilmen of the city of Fort Scott, in the State of Kansas, their certain attorney, successors, and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this fourteenth day of August, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas lately, at a term of the circuit court of the United States of America, in and for the district of Kansas, in a

73 suit depending in said court between The United States of America *ex relatione* the said The Concord Savings Bank and the said The Mayor and Councilmen of the city of Fort Scott, in the State of Kansas, a judgment was rendered against the said relator, and the said relator having obtained a writ of error to the Supreme Court of the United States of America, and filed a copy thereof in the clerk's office of the said Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said The Mayor and Councilmen of the city of Fort Scott, in the State of Kansas, citing and admonishing them to be and

appear at the Supreme Court of the United States, to be holden at Washington the second Monday of October next.

Now the condition of the above obligation is such that if the said The Concord Savings Bank shall prosecute the said writ of error to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] The Concord Savings Bank, by John M. Hill, Vice President and acting President.

Attest:

J. E. M. CERTUN, *Secretary.*

74 THOMAS STUART, [SEAL.]
GEORGE JONES, [SEAL.]
Sureties.

Sealed and delivered in the presence of

A. P. FITCH,
H. M. CORD.

This bond approved by me this 24th day of August, A. D. 1878.

JOHN F. DILLON, *Judge.*

UNITED STATES OF AMERICA,
District of New Hampshire.

I, William H. Hackett, the clerk of the circuit court of the United States for the district of New Hampshire, do certify that I am personally acquainted with Thomas Stuart and George Jones, the sureties who have executed the foregoing bond; that they are worth beyond all their liabilities the sum of thirty thousand dollars, and that I recommend the approval of the said bond.

Given under my hand and the seal of said court, on the SEAL. twentieth day of August, A. D. 1878.

WILLIAM H. HACKETT,
Clerk Circuit Court of U. S., Dist. of New Hampshire.

Endorsed: No. 2146. United States ex rel. The Concord Savings Bank vs. The Mayor and Councilmen of the City of Fort Scott, State of Kansas. Appeal bond. Filed Sept. 5, 1878. A. S. Thomas, clerk, by J. N. Strickler, deputy.

75 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America, for the district of Kansas, do hereby certify the foregoing to be a true, full and perfect copy of the record of all the prrceedings in the action of The United States of America *ex relatione* The Concord Savings Bank *vs.* The Mayor and Councilmen of the City of Fort Scott, in the State of Kansas. No. 2146, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka in said district of Kansas, this sixth day of September, A. D. 1878.

[SEAL.] A. S. THOMAS, *Clerk.*
By J. N. STRICKLER, *Deputy.*

76 *United States of America, ss:*

The President of the United States, to the honorable the judges of the circuit court of the United States for the district of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you, between the United States of America *ex relatione* The Concord Savings Bank, plaintiff, and The Mayor and Councilmen of the City of Fort Scott, in the State of Kansas, Defendants, a manifest error hath happened, to the great damage of the said relator, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held. That the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 27th day of August, A. D. 1878.

A. S. THOMAS,
Clerk of the Circuit Court of the United States,
for the District of Kansas.
By J. N. STRICKLER, *Deputy.*

Endorsed: No. 2146. U. S. ex rel. The Concord Savings Bank *vs.* The Mayor and Councilmen of the City of Fort Scott. Writ of error. Filed August 27, 1878. A. S. Thomas, clerk. By J. N. Strickler, deputy.

77 *The United States of America.*

To the Mayor and Councilmen of the city of Fort Scott, in the State of Kansas, greeting.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washing-

ton, in the District of Columbia, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the district of Kansas, wherein the United States of America *ex relatione* The Concord Savings Bank, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John F. Dillon, judge of the said circuit court, this 24th day of August, A. D. 1878.

JOHN F. DILLON,
Circuit Judge.

78 Due service of this citation is hereby admitted.
Fort Scott, Kansas, August 28th, 1878.

HULETT & McCLEVERTY,
Att'ys for Def'ts in Error.

Endorsed: No. 2146. Supreme Court United States. United States *ex rel.* The Concord Savings Bank *vs.* The Mayor and Councilmen of the City of Fort Scott, State of Kansas. Citation. Filed Sept. 5, 1878. A. S. Thomas, clerk. By J. N. Strickler, deputy.

(Endorsed on cover:) KANSAS. C. C. U. S. No. 829. The United States ex rel. The Concord Savings Bank, Plaintiffs in Error, *vs.* The Mayor and Councilmen of the City of Fort Scott. Filed 8th October, 1878.

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, ON THE RELATION OF THE CONCORD SAVINGS BANK, Plaintiff in Error, *vs.* THE MAYOR AND COUNCILMEN OF THE CITY OF FORT SCOTT, STATE OF KANSAS, Defendant in Error.	No. 829.

Error to the Circuit Court of the United States for the District of Kansas.

Argument of James D. Campbell for the Plaintiff in Error.

STATEMENT OF THE CASE.

The question is whether the relator is entitled to a peremptory writ of mandamus, commanding the mayor and councilmen, composing the city council of the city of Fort Scott, "to levy and collect a sufficient tax *upon all the taxable property* within the said city" to pay a judgment recovered against the city by the relator, and to cause "the said moneys" to be paid over to the relator.

The Concord Savings Rank, claiming to have purchased for value, before maturity, fourteen bonds of the city of Fort Scott, after their maturity brought suit to recover upon them in the court below, making apt averments in its declaration.—(Record, p. 1.)

The defendant claimed by its answer, (Record, p. 12,) making the proper averments for that purpose,—

1st. That the bonds sued on being "*Special Improvement Bonds*," issued under the act of March 2, 1871, (which see *post*,) were not the general obligations of the city, but were only collectible out of the special assessments, provided for in the act, to be made against the property abutting on the improved streets.

2d. That it being provided by the express terms of the ordinance under which the bonds were issued, that they "shall be paid, principal and interest, solely from special assessments to be made upon and collected solely from the lots and pieces of ground fronting upon or extending along the street the distance improved;" and as (so it was averred) "plaintiff and all others had full notice at all times, from *the face of said bonds and coupons*, that said defendant was not and is not generally liable thereon, and that the only fund provided by law for the payment thereof is the assessments above mentioned," there was no general liability on the part of the city to the plaintiff; and,

3rd. That the "special assessments" contemplated by the act and by the ordinance, having been made by the city for the purpose of paying the bonds and coupons issued under the act, including those in suit, and having paid over the amount collected, as fast as such assessments could be and were collected, the city had performed its whole duty in the premises, and, consequently, was under no liability of any kind.

The following are the provisions of the act of 1871:

SECTION 16. The cities coming under this act, in their corporate capacities are authorized and empowered to enact ordinances for the following purposes, in addition to the powers granted by law: * * * * 2d. To open and improve streets, avenues, and alleys, make sidewalks and bridges, culverts and sewers, within the city; and for the purpose of paying for the same, shall have power to make assessments in the following manner, to wit: * * * * *Third*. For paving, macadamizing, curbing, and guttering

all streets, (alleys), and avenues, and excavating, grading, and filling for the same, and for all improvements of the squares and areas formed by the crossing of the streets, the assessments shall be made on all lots and pieces of ground to the center of the block, extending along the street or avenue to the distance improved, or to be improved, according to the assessed value of the lots or pieces of ground, without regard to the buildings or improvements thereon, which value shall be ascertained by three disinterested appraisers, appointed by the mayor and council. * * *

SEC. 17. The assessment made pursuant to the third clause of the second subdivision of the preceding section to be known as "Special Assessments for Improvements," and except as hereinafter provided, shall be levied and collected as one tax, in addition to the taxes for general revenue purposes, and shall be certified by the city clerk to the county clerk, to be placed on the tax-roll for collection, subject to the same penalties, and collected in like manner as other taxes under existing laws. *But the mayor and council shall have power* to issue the BONDS OF THE CITY for the cost of paving, macadamizing, curbing, and guttering streets and avenues, and excavating, grading, and filling the same, to be made payable as follows: One-third of the aggregate amount of such bonds of any issue, in one year, one-third in two years, and one-third in three years, with interest at the rate of ten per cent. per annum, payable annually. And for the payment of said bonds, assessments shall be made in each year to pay the principal and interest *accruing on said bonds*, during said fiscal year, upon the taxable property chargeable therewith, as is provided in the third clause of the second subdivision of the preceding section; and such taxes shall be certified by the city clerk to the county clerk, and placed upon the tax-roll for collection, subject to the same penalties and collected in like manner as other taxes.

Before the issuance of the bonds, and pursuant to the act, the city council passed "An ordinance ordering the grading, curbing, guttering, and macadamizing a part of Wall street," whereby, in respect to the issuance of bonds, it is provided (Record, p. 32)—

SEC. 3. The grading, curbing, guttering, and macadamizing ordered in section one of this ordinance shall be paid for in the bonds of the city, to be registered and classified

as "Special Improvement Bonds," said bonds shall be dated the first day of March, 1872, shall be signed by the mayor, attested by the city clerk under the corporate seal of the city, and countersigned by the city treasurer, and shall be made payable one third in one year, one third in two years, and one third in three years after the date thereof. They shall bear interest at the rate of ten per cent. per annum, payable annually, and shall be paid principal and interest solely from special assessments to be made upon and collected solely from the lots and pieces of ground fronting upon or extending along the street the distance improved, in the manner provided in sections sixteen and seventeen of an act of the legislature of the State of Kansas, entitled "An act relating to the powers and government of cities of the second class, and to repeal certain sections of chapter 19 of the General Statutes of 1868," approved March 2, 1871. The mayor and clerk shall be authorized to make said bonds payable in the city of New York.

The bonds sued on are in the following form (Record, p. 29):

UNITED STATES OF AMERICA.

No.—— SPECIAL IMPROVEMENT BOND OF THE CITY OF FORT SCOTT, KANSAS. $500.

Know all men by these presents:

That the city of Fort Scott, in the State of Kansas, for value received, acknowledges itself to owe and hereby promises to pay to the holder of this bond, on the first day of March, A. D. 1875, at the Fourth National Bank, in the city of New York, the sum of five hundred dollars, lawful money of the United States of America, with interest thereon at the rate of ten per cent. per annum, payable annually at said National Bank on presentation and surrender of the coupons hereto attached, as they severally become due.

In witness whereof, the said city of Fort Scott has caused this bond to be signed by its mayor and attested by the clerk under the corporate seal of the city, the 27th day of April, A. D. one thousand eight hundred and seventy-two.

[L. S.] F. R. BOYLE, *Mayor.*

Attest: S. KAISER, *City Clerk.*

Issued in accordance with sections 16 and 17 of the act of the legislature of the State of Kansas, entitled "An act

relating to the powers and government of cities of the second class, and to repeal certain sections of chapter 19 of the General Statutes of 1868," and in pursuance of an ordinance of the city of Fort Scott, entitled "An ordinance ordering the grading, curbing, guttering, and macadamizing of a part of Wall street."

Countersigned by the city treasurer, this 27th day of April, 1872.

W. J. SINN, *City Treasurer.*

On this state of the record, the plaintiff demurred to the answer.—(Record, p. 15.)

After argument the court below sustained the demurrer and rendered judgment for $9,689.30; the entry contained the following:

"And it is further ordered and adjudged that the judgment now here rendered be enforced and collected pursuant to law in such cases made and provided."—(Record, p. 17.)

On the information filed by the relator (Record, p. 18,) the court awarded an alternative writ of mandamus, reciting the recovery of the judgment and the bonds upon which it is based, commanding "the mayor and councilmen composing the city council of the city of Fort Scott" to "levy and collect a sufficient tax upon all the taxable property within the said city of Fort Scott to pay the above recited judgment and interest and costs, and * * * cause the said moneys to be paid over to the Concord Savings Bank, or show cause," &c.

The respondents made return reciting the statute, ordinance, bonds, and judgment, and without showing that there is or ever will be any fund available to the relators, alleging that before the maturity of the bonds the city "did levy and cause to be made the assessments provided for" in the act, sufficient in amount to pay the amount of the "special improvement bonds" and interest; and that all amounts collected have been promptly paid over to the holders of said bonds.—(Record, p. 26.)

The relator demurred to the return.—(Record, p. 37.)

The court rendered judgment on the demurrer (Record, p. 37), overruling the demurrer, quashing the alternative writ, and dismissing the information.

Lying back of and leading up to the question first stated, the following seem to arise on the record:

1. Whether the bonds authorized by section 17 of the act of March 2, 1871, are the general obligations of the city, or are such obligations as that the creditor can only look to the fund arising from the "special assessments" for their payment.

2. Whether, if the act contemplates the issuance of general obligations, it is competent for the council to limit the obligations by ordinance, and whether it was contemplated in the ordinance to limit the obligation of the bonds so as to confine the remedy of the holder to the special improvement fund.

3. Whether, granting it was competent to do so, and that the council did in fact limit the obligation of the bonds by the terms of the ordinance, the city may take advantage of it against the relator, who is adjudged to be a *bona fide* purchaser for value before maturity, under the circumstances of the case; and—

4. Whether the judgment of the court below is conclusive against the city upon the point that the bonds are the valid general obligations of the city in the hands of the plaintiff, which the mayor and councilmen are bound to provide for by the levy of a sufficient tax upon all the taxable property within the city.

Should the contention of the relator in respect to these questions be sustained by the court, it would seem to follow that the judgment of the court below overruling the relator's demurrer to the respondent's return to the alternative writ should be reversed.

Assignment of Errors.

The relator avers that there is manifest error on the face of the record, in this:

1. The circuit court erred in overruling the relator's demurrer to the return of the respondent.

2. The circuit court erred in refusing to sustain the demurrer of the relator to the return of the respondent, and in refusing to allow a peremptory writ of *mandamus*.

3. The circuit court erred in quashing the alternative writ.

4. The court erred in dismissing the relator's information.

BRIEF OF ARGUMENT.

I.

THE LEGISLATURE CONTEMPLATED THE ISSUANCE OF GENERAL OBLIGATIONS.

1. The language of the act is quite clear and explicit. "But the mayor and council shall have power to issue *the bonds of the city* for the cost of paving, macadamizing, curbing, and guttering streets and alleys, and excavating, grading, and filling the same," etc. According to the ordinary uses of language, these words are capable of but one meaning. They describe obligations whereby the public faith is pledged to the payment of the moneys "nominated in the bond," and they do not fitly describe anything else, or less than such. Obligations issued in the name of the city merely pledging certain assessments or revenues, are not "bonds of the city," within the meaning of the act; naturally and properly such obligations should have some distinctive name suited to their special nature. It is inconceivable that the legislature should have contemplated the issue of obligations in respect to which there should be no liability on the part of the city, without employing a single word tending to limit and control the general language whereby the mayor and council are authorized to issue "the bonds of the city."

2. This interpretation is not only supported by the fair import of the words, but by every inquiry into the purpose

of the law. The history of cities and towns, as well as that of municipal bonds, furnishes many instances where general public obligations have been issued for particular local improvements. Such, indeed, has been the policy of nearly every state in the Union—certainly of nearly every western state. That it has been the policy of this State of Kansas, this court too well knows. The improvement of particular streets and highways must always be regarded as of general advantage to the whole population. The use of highways is never confined to the owners of property abutting upon them; they are for the general use of the public. The making of local improvements at the general expense may be justified on many grounds. That the ultimate payment for such improvements is provided by this act to be made by the owners of abutting property, by no means detracts from the argument. It is sufficient for the present purpose to suggest that while adjacent owners are ultimately to pay for the improvements (doubtless from the consideration that the burden of like improvements upon other highways shall in their turn be borne in the same way), yet the advantage to the general public of speedy completion may well justify the pledging of the public revenue in anticipation of local assessments. Motives of economy, too, doubtless entered into the consideration of the subject by the legislature; should particular revenues only be pledged, or particular sources of revenue, the credit of the bonds would likely suffer, and consequently the work would be more expensive; but where the whole credit of the municipality is pledged, it may well be seen that a given amount of bonds will pay for a much greater proportion of improvements. Considerations of this nature might be indefinitely multiplied.

3. We insist, with great confidence, in addition to the considerations above suggested, that the bonds contemplated by the act must be taken to be general "bonds of the city," unless there is a clear direction to the contrary contained in the act, either in express words, or arising by

some necessary implication. No claim can be made that the statute contains any express limitation whatever.

4. It will be contended that this implication arises from the latter clause of section 17 of the act, providing for special assessments for the payment of the principal and interest of these bonds, on the ground, I presume, that the provision of a particular fund for the payment of the debt limits the remedy of the creditor to the fund thus provided. If the doctrine is sound, it has provided a very unsubstantial and unsatisfactory remedy, for it has not produced and will not produce a solitary dollar toward the payment of this debt. We are not outside of the record in making this assertion, for it appears on the face of the respondent's return to the alternative writ, that before the maturity of the bonds, and long before the commencement of the plaintiff's suit, the special assessment had been levied wholly without effect—I say without effect, because, if there had been a single dollar in the treasury available to the relator, the fact would have been stated in the return. But be that as it may, the clause in question has nothing to do, and does not purport to have anything to do, with the remedy of the holders of these bonds against the city, and it cannot be extended by interpretation beyond the plain meaning of the words. There is no requirement that this provision shall be incorporated in the bonds, nor is there any requirement that the bonds shall be only *payable* out of this fund; the substance of the requirement simply is, that a fund shall be provided, by the means described, for the payment of the principal and interest of the bonds as they mature. In other words, having clothed the city with authority to assume an obligation, the legislature has placed in its hands the means of redeeming the obligation when it matures, by appropriating a portion of the increased value of the improved property. In short, it is the sole object and purpose of the provision under consideration to provide a fund for the indemnity of the general revenue against the obligations about to be incurred, in case they should be

called upon. If the legislature meant more than that it should have said so. In respect to the ordinary transactions between individuals, where one at the time of contracting an indebtedness, sets apart a particular fund for its payment (which it is wise and prudent to do), or pledges some particular fund or property as security, we know of no rule of law or morals which confines the remedy of the creditor to that fund or property. Why should a different rule be applied to the provisions of a statute and the contracts of municipal corporations? It would be novel indeed that the providence of the debtor, in making provision for the payment of his debt, should be the means of defeating the creditor entirely.

But we understand that the principle laid down by the majority of this court in *United States vs. Clark County*, 6 Otto, 211, is conclusive on this point, that the provision contained in the act in question for special assessments for the payment of the bonds, limits neither the obligation of the bonds nor the remedy of the holder. The case of *The Commonwealth, ex rel. Henry Whelen vs. The Select and Common Council of the City of Pittsburgh*, Sup. Ct. Penn., Nov. 1878, (Pittsburgh Legal News, Nov. 28, 1878,) seems also in point. As this opinion has already been called to the attention of this court in another case, we forbear to quote from it, but we understand it to be decisive of the precise question under consideration here.

Again, it is claimed the implication arises from the absence of any provision for the payment of the bonds out of the general revenues. Without seeing the force of the argument, we think very substantial provision is made, for subsequent sections of this same act provide as follows:

SEC. 21. The city council are hereby required to make provision from time to time for a sinking fund to redeem at maturity the bonded indebtedness of the city, and the taxes levied for said sinking fund shall be payable only in cash.

SEC. 22. The city council are authorized and required to levy annually, taxes on all taxable property within the

city, in addition to other taxes, and sufficient in amount, for the purpose of paying the interest and coupons as they become due, on all BONDS OF THE CITY now issued or hereafter to be issued by the city, which taxes shall be payable only in cash.

SEC. 18. The council may appropriate money and provide for the payment of the debts and expenses of the city. * * *

We call attention to the fact that the language used to describe the obligations for which general taxes are to be levied is, "*all* bonds of the city," precisely the same as that used in the same act to confer authority to issue the bonds in question.

II.

We submit, also, that since the article in question contemplates the issuance of the general bonds of the city, it was not competent for the council, by the ordinance, to limit the obligation of the bonds or the remedy of the creditor, because the very reasons which induced the legislature to provide for general obligations would render it improper in the council to defeat the object. We do not urge this consideration upon the attention of the court, because we do not conceive it to be very material in view of the point we make further on, but we do not waive any advantage that may be derived from it.

III.

It may be well, also, to suggest that, fairly construed, the provisions of the ordinance do not purport to and do not constitute a limitation upon either the obligation of the bond or the remedy of the holder.

It will be seen the ordinance, section 3, provides that the work shall be paid for in "*the bonds of the city*," and for the manner of their execution; then follows the declaration that they "shall be paid * * solely from special assessments to be made upon and collected solely from the lots," etc. It will be observed that the bonds provided for are

the bonds of the city, absolutely payable at certain times, with a certain rate of interest. It is not declared that it shall be provided in the bonds that they shall be *payable* "solely from special assessments." It occurs to us the provision only amounts to this: that the bonds, in substance and form before provided (*i. e.*, general absolute obligations), *shall be paid* out of the special assessments, but it is clear this is not a part of the contract, nor was it intended to form a part of the contract, and ought not to be effectual to limit either the obligation or the remedy. It is the declaration of a purpose on the part of the city council that the means provided by the legislature shall be employed, and that the burden of these improvements shall not rest upon the general revenues. With that purpose the holders of these bonds have nothing to do; the bonds must be paid by the city whether these special revenues are sufficient or not, and it is for the council to see that the public treasury is reimbursed pursuant to the direction contained in the ordinance.

But we do not regard this consideration as vital to the case, and do not urge it further.

IV.

THE BONDS ARE IN FORM AND SUBSTANCE, ABSOLUTE GENERAL OBLIGATIONS.

They constitute an absolute unlimited promise, on the part of the city, to pay the money on a day certain, and contain no words of qualification or restraint. The recital on the margin referring to the ordinance is a mere recital; it is neither a limitation or condition. If it was intended by the city council that it should be part of the contract that the obligation of the bonds should be limited, not only sound sense and reason, but good morals and common honesty require they should have said so explicitly and clearly, and they should have followed up the declaration by providing on the face of the bonds that they should only be *payable* out of the particular fund, and should not

be taken to be the general obligations of the city. The respondents should not be allowed to issue obligations, general and unlimited in their terms, and afterwards evade liability on the strength of obscure and uncertain declarations collaterally made; they ought not, at once, to get credit for their bonds on the strength of their general character, and to deny their obligation on account of supposed limitations not clearly and definitely expressed. The rule applied by the courts to contracts between man and man is, that when they do not say what they mean, they will be held to mean what they say. Why not here as well?

V.

BONA FIDE PURCHASERS FOR VALUE OF THESE BONDS, BEFORE MATURITY, ARE NOT BOUND BY THE PROVISIONS OF THE ORDINANCE.

1. Assuming now that the act authorizes the issue of general obligations and that the bonds in question are in form and substance such general obligations conforming to the power contained in the act, it is not competent for the defendants to deny their absolute general liability. It appears in the declaration that the plaintiff was a purchaser for value before maturity; this averment is not denied by the answer, except so far as the claim that the purchasers were bound to take notice of the provisions of the ordinance amounts to a denial, hence, for the purposes of the argument, the relator must be taken to be an innocent holder.

2. It is true there is in the answer an allegation of notice to the plaintiff, but it is in these words: "That plaintiff and all others had full notice at all times, from the *face of said bonds and coupons*, that said defendant was not and is not generally liable thereon, and that the only fund provided by law for the payment thereof is the assessments above mentioned." We submit this averment raises no issue of fact, but simply suggests a legal inference. Do the face of

the bonds and coupons impart notice to the purchasers, of the alleged limitation? Most assuredly not. It will be noticed the recital of the ordinance is a mere reference to its title, and does not contain the slightest intimation of the supposed limitation. Here there is no notice of the claim of defendants that the bonds are not general obligations, for they are absolute and unconditional promises to pay; there is no notice "that the only fund provided by law is the special assessment," for, by reference to the statute (secs. 21 and 22, above quoted), the most unlimited means are provided for the payment of all general obligations. Moreover, aside from the principle that the purchaser is not bound to look beyond the face of the instrument, except for the *authority* to make it, the recital in question tends to lull suspicion and to prevent inquiry, for it declares that these bonds in form and substance were issued *in accordance with the statute*. Now, since the statute has authorized the issuance of general absolute obligations, and the bonds are general absolute obligations issued *in accordance* with the statute, what purpose would be served by further inquiry? If the bonds and the ordinance both conform to the statute, as the recital expressly declares they do, a purchaser is certainly not put on his guard to inquire beyond the provisions of the statute itself. There is nothing, then, in this case requiring an exception to the rule that the purchaser of municipal bonds for value before maturity, "is not bound to look further than to see that authority of law for their issue exists;" and there is no question suggested on the face of the bond or the recital on the margin calling for an examination of the terms of the ordinance.

VI.

THE JUDGMENT RENDERED IN THE CIRCUIT COURT IS CONCLUSIVE AGAINST THE RESPONDENTS ON THE POINTS IN QUESTION.

1. Before presenting this point to the consideration of the court, the writer feels called upon to admit, because he knows it to be the fact, that it was the purpose of his honor,

Judge Dillon, in framing the entry, to reserve the real question in controversy for consideration when the *mandamus* proceedings should come before him; but he feels less hesitation in presenting the question here, for the reason that he immediately called the attention of the defendant's counsel to the effect of the judgment, in season to apply for a correction if they should be so advised, and for the further reason that he is convinced, if the matter had then been pressed to a decision, the court would have reached a correct conclusion. Under the circumstances the writer does not urge the point unduly, but believing his client to be entitled to have it called to the attention of the court, it is submitted for what it is worth.

2. Whatever may have been its purpose, the clause relied upon is mere surplusage. It adds nothing, and limits nothing. We admit the propriety in proper cases of controlling the operation of the judgment by limiting the execution; but, in all such cases to which our attention has been called, the judgment expressly limits the execution to particular assets.—(*See Jordan vs. Cass County*, 3 *Dillon*, 194, approved and followed by this court in *County of Cass vs. Johnston*, 5 *Otto*, 370.)

VII.

Whatever may be the judgment of this court in respect to the sufficiency of the return to the alternative writ, we insist the fourth assignment of error must be sustained.

The question before the court raised by the demurrer was confined to the sufficiency of the return, and the judgment of the court overruling the demurrer fully determined that question; but the court went further, and without any motion quashed the alternative writ; if it had stopped there we should not complain of that alone, for the ultimate quashing of the writ would necessarily follow the opinion upon which the demurrer was decided, but the court went still beyond that and dismissed the information itself. This was error, because even if the relator was not entitled to

the remedy he sought, it was at least entitled to have the special assessment enforced; but the court has left the relator without any remedy whatever.

In conclusion, if the reasoning here presented is sound, it follows that the bonds issued are general obligations of the city, and that in the refusal to allow a peremptory writ of mandamus there is error to the prejudice of the relator, for which the judgment of the circuit court should be reversed.

JAMES D. CAMPBELL,
Of Counsel.

DAVENPORT, IOWA.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1878.

THE UNITED STATES OF AMERICA, ON THE RELATION OF THE CONCORD SAVINGS BANK, Plaintiff in Error, *vs.* THE MAYOR AND COUNCILMEN OF THE CITY OF FORT SCOTT, STATE OF KANSAS, Defendant in Error.	No. 829.

Error to U. S. Circuit Court, District of Kansas.

REPLY TO ARGUMENT FOR DEFENDANT IN ERROR.

We beg the indulgence of the court for a brief reply to the argument filed on behalf of the defendant in error, for the purpose of pointing out that:—

I.

Counsel in argument seems wholly to ignore the grounds upon which the general liability of the city rests, to wit: that the act *authorizes* and the city in fact *issued* general obligations.

2. Counsel assumes that it will result from the general liability that the special assessments will wholly fail, and

that the adjacent property will escape the impositions provided by the statute. Not at all. It is perfectly clear that whether the city is held to be generally liable to the holders of the bonds or not, it is equally incumbent upon the officers to enforce the collection of the special assessments as well in the one case as the other. What we contend for is that it is for the city and not for the holders of the bonds to look to the special assessments. Nor does it follow from our view of the matter that the bondholders may not, if their protection require it, compel the collection of the special assessments.

II.

The authorities cited by counsel seem to us to be wholly inapplicable to the case made on this record. They establish the doctrine in a general way that where the *damages* for property taken for public purposes, or the price for work done, are expressly made *payable* out of special assessments provided for that purpose without recourse to the general revenues, *and* where the corporate authorities are only charged by law with the duty of setting in motion the proper machinery, they are not liable *in the first instance*. But on the whole, these cases seem to us to show that where the corporation has undertaken to pay, or has issued obligations general in their nature, or has omitted its duties, or has caused the moneys to be collected, it is liable directly in a proper action.

2. But here, we have a case wholly different from any of these. We have the absolute general promise of the city to *pay* the moneys named in the bonds, made pursuant to the authority contained in the act. We are convinced if any *such* case exists, where the general liability is denied, the patient industry of the learned counsel would have been rewarded by finding it.

JAS. D. CAMPBELL,
Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, EX RELATIONE THE CONCORD SAVINGS BANK, *Plaintiff in Error*,

vs.

THE MAYOR AND COUNCILMEN OF THE CITY OF FORT SCOTT, IN THE STATE OF KANSAS, *Defendants in Error*.

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

STATEMENT.

In this case the relator, The Concord Savings Bank, seeks a mandamus to compel the Mayor and Councilmen of the city of Fort Scott, Kansas, the respondents, to levy a general tax upon all the taxable property within the corporate limits of said city, for the purpose of paying a judgment rendered in favor of said bank and against said city, at the November term, 1877, of the United States Circuit Court for the district of Kansas. The judgment was based upon certain bonds and coupons issued by the city of Fort Scott, Kansas, in 1872, and known and designated upon their face as "special improvement bonds."

The authority under which these bonds were issued was shown by a recital set forth upon the face of each bond. The recital is as follows, to wit:

"Issued in accordance with sections 16 and 17 of an act of the legislature of the State of Kansas, entitled—

"An act relating to the powers and government of cities of the second class, and to repeal certain sections of chapter 19, of the General Statutes of 1868.

"Approved March 2, 1871, and in pursuance of an ordinance of the city of Fort Scott, Kansas, entitled—

"An ordinance ordering the grading, curbing, guttering, and macadamizing a part of Wall street.

"Countersigned by the city treasurer this twenty-seventh day of April, 1872.

"W. I. LINN,
"*City Treasurer.*"

The law and the ordinance under which said bonds were issued provided that assessments, to be known as "special assessments for improvements," should be levied upon the property improved for the payment of said bonds.

The respondents made return to the alternative writ of mandamus, setting forth that these "special assessments" had been levied as provided by law in such cases, and denied that relator was entitled to the levy of a general tax. The relator demurred to the return. The demurrer was overruled as to the return, and being carried back to the information, the first defective pleading which was held to be defective in that it prayed for the levy of a general tax when the relator was only entitled to the levy of said "special assessments," it was sustained as to that, the information dismissed, and the respondents discharged with costs. (See judgment entry, record, page 37.) The relator excepted, and now brings the case to this court.

ARGUMENT.

I. The purpose of a mandamus is to compel the performance of a duty imposed by law. The relator set forth and claimed that the judgment sought to be enforced was an absolute judgment for so much money, due generally by the city of Fort Scott, for the payment of which it was the duty of respondents to levy a general tax.

The respondents averred that the judgment was not absolute, nor for a general indebtedness; but that it was special and limited, and fixing only the amount due the relator upon certain "special improvement bonds," and set forth the

judgment in full, which contained the following limiting words, to wit:

"And it is further ordered and adjudged that the judgment now here rendered be enforced and collected pursuant to law in such case made and provided." (See Exhibit "B," attached to return of respondents' record, page 31.)

That all of said bonds were exactly the same except as to the number; that upon the face of each of said bonds was contained the said recital above set forth, and attached a copy of one of said bonds with all recitals thereon. (See Exhibit "A," attached to return of respondents' record, page 29.)

That the city of Fort Scott was a city of the second class, as averred by relator; that the assessments provided by law in such cases had been levied, and in sufficient amount to pay said bonds and coupons as they became due; that all amounts collected had been paid over to the holders of the bonds, and that no portion thereof was on hand; that it was not their duty to levy a general tax. Respondents attached a copy of the ordinance under which the bonds were issued, and, also, a copy of relator's demand. (See Exhibits "C," page 32, and "D," page 34, attached to return of respondents.)

The demurrer of relator admitted all this to be true, and it will be noticed that the matters set forth in the return, together with the exhibits thereto attached, very fully inform the court of the exact nature of the case.

II. It has been the constant practice in this State that local improvements in the shape of sidewalks and other street improvements, such as curbing, guttering, and macadamizing, should be levied upon and paid by the abutting property; and if in the face of express legislation to that effect the relator can compel the levy of general taxes for that purpose, then the legislature of the State of Kansas has enacted much abortive legislation. The duty of the city in such cases is expressly and explicitly defined in said sections 16 and 17, above referred to, and the kind of tax to which the holder of

the bonds issued thereunder is entitled is just as clearly set forth.

So much of said section 16 as refers to this case, and section 17 in full, are as follows, to wit:

"SECTION 16. The cities coming under the provisions of this act in their corporate capacities are authorized and empowered to enact ordinances for the following purposes, in addition to the other powers granted by law: First, * * *

"Second, to open and improve streets, avenues, and alleys, make sidewalks, and build bridges, culverts, and sewers within the city; and for the purpose of paying for the same shall have power to make assessments in the following manner, to wit: First, for opening, widening, and grading all streets and avenues, and for building bridges, culverts, and sewers, and for foot-walks across streets, the assessments shall be made on all taxable property within the corporate limits of the city, not exceeding five mills on the dollar for these purposes in any one year. Second, for making and repairing sidewalks the assessments shall be made on all lots and pieces of ground abutting on the improvement, according to the front foot thereof; third, for paving, macadamizing, curbing, and guttering all streets, alleys, and avenues, and excavating, grading, and filling for the same, and for all improvements of the squares and areas formed by the crossing of streets, the assessments shall be made on all lots and pieces of ground to the center of the block extending along the street or avenue, the distance improved or to be improved, according to the assessed value of the lots or pieces of ground, without regard to the buildings or improvements thereon, which value shall be ascertained by three disinterested appraisers, appointed by the mayor and council. * * * * *

"SEC. 17. The assessments made pursuant to the third clause of the second sub-division of the preceding section shall be known as "special assessments for improvements," and, except as hereinafter provided, shall be levied and collected as one tax, in addition to the taxes for general revenue purposes, and shall be certified by the city clerk to the county

clerk, to be placed on the tax roll for collection, subject to the same penalties and collected in like manner as other taxes under existing laws. But the mayor and council shall have power to issue bonds of the city for the costs of paving, macadamizing, curbing, and guttering streets and avenues and excavating, grading, and filling for the same, to be made payable as follows: One-third of the aggregate amount of such bonds of any issue in one year; one-third in two years, and one-third in three years, with interest from their date, at the rate of ten per cent. per annum, payable annually. And for the payment of said bonds, assessments shall be made in each year to pay the principal and interest maturing on said bonds during said fiscal year, upon the taxable property chargeable therewith, as is provided in the third clause of the second subdivision of the preceding section, and such tax as shall be certified by the city clerk to the county clerk, and placed upon the tax roll for collection, subject to the same penalties and collected in like manner as other taxes. "Laws of Kansas, 1871, page 148.

Pursuant to said sections 16 and 17, the city of Fort Scott enacted the said ordinance under which these bonds were issued, a copy of which in full is attached to the return of respondents (see Exhibit "C" attached to return, page 32.) Sections 1 and 2 of said ordinance directs what improvement shall be made, and section 3, which is in full as follows, provides for the manner of payment thereof, to wit:

"SEC. 3. The grading, curbing, guttering and macadamizing ordered in section 1 of this ordinance, shall be paid for in the bonds of the city, to be registered and classified as "special improvement bonds;" said bonds shall be dated the first day of March, 1872, shall be signed by the mayor, attested by the city clerk under the corporate seal of the city, and countersigned by the city treasurer, and shall be made payable one-third in one year, one-third in two years, and one-third in three years after the date thereof. They shall bear interest at the rate of ten per cent. per annum, payable annually, and *shall be paid, principal and interest, solely*

from special assessments, to be made upon and collected solely from the lots and pieces of ground fronting upon or extending along the street the distance improved, in the manner provided in sections sixteen and seventeen of an act of the legislature of the State of Kansas, entitled 'An Act relating to the powers and government of cities of the second class, and to repeal certain sections of chapter 19 of the General Statutes of 1868,' approved March 2, 1871. The mayor and clerk shall be authorized to make said bonds payable in the city of New York."

Of course this case is to be determined by the meaning of the law above quoted, and in reaching that conclusion the evident legislative intent is to control. That intent, as appears very plainly by section 16, is that general improvements are to be paid by general taxes, and special improvements by special taxes or assessments. The second subdivision of section 16 authorizes the opening and improvement of streets, the building of sidewalks, bridges, culverts, and sewers. The first clause of said second subdivision provides that so much of these improvements as are in their nature general, and necessarily of general benefit to the whole city, such as opening streets, widening and grading them, and the building of bridges, culverts, sewers, and foot-walks across streets, all of which evidently means making the streets generally passable, shall be paid for by a general levy. On the other hand, the second clause of the second subdivision very sharply marks the difference by providing that the making and repairing of sidewalks shall be paid for by the levy of special assessments upon the abutting property. While the third clause of the second subdivision, which is the one involved in this case, just as sharply provides that the other class of local or special improvements, such as paving, curbing, guttering, macadamizing, etc., shall be paid for by special assessments to be levied upon the property improved.

This distinction is evidently upon the theory that the greatest fairness is that the property benefitted by these local im-

provements should bear the expense, for in these small towns none but the "business part" of town is improved, and that part is certainly specially improved by being well paved, curbed, and guttered, for while all who come to town may and do come in upon many different streets and so do not cut up any one street very much, yet all must finally centre upon these particular business streets. But whatever the theory may be, the meaning and intent are very plain and are very clearly expressed.

It will be noticed that the third clause of the second subdivision of section 16 would require that the entire cost of the improvement therein mentioned should be levied and collected as one tax, and so be payable in one year, and for the purpose of dividing and lightening that burden, section 17 authorizes the issuance of these special improvement bonds, making the bonds payable in one, two and three years, and dividing the assessment mentioned in said third clause into three parts, payable also in one, two, and three years. The tax provided for the payment of these bonds is expressed in the following words in section 17, to wit:

"And for the payment of these bonds assessments shall be made in each year to pay the principal and interest accruing on said bonds during said fiscal year upon the taxable property chargeable therewith, *as is provided in the third clause of the second subdivision of the preceding section.*"

Which is still carrying out the idea that local improvements shall be paid in local assessments, just as section 19 of the same act carries out the opposite idea that general improvements shall be paid in general taxes, and both sections make more clear, if possible, the intent and meaning of section 16 than it would be if standing alone. For while section 17 is evidently carrying out and based upon the *third* clause of the second subdivision of section 16, so section 19 just as evidently is carrying out and based upon the *first* clause of the second subdivision of the same section, as will be seen by reading section 19, which is in full, as follows, to wit:

"SEC. 19. The council may provide for making any and

all improvements of a *general* nature in the city, and for the purpose of paying for the same may from time to time borrow money and may issue bonds therefor, and street bonds to contractors and others performing work or furnishing materials. But no such money shall be borrowed or bonds issued until the city council shall be instructed so to do by a majority of all the votes cast at an election held in such city for that purpose. Bonds issued under this section shall be payable in not less than ten years nor more than twenty years from the date of their issue, with interest thereon at a rate not exceeding ten per cent. per annum, with interest coupons attached, payable annually or semi-annually. *The council shall levy taxes on all the taxable property within the city*, in addition to other taxes, *to pay said bonds at their maturity and their interest coupons* as they respectively become due, which taxes shall be paid in cash only."—Laws of Kansas, 1871, page 150.

III. The plaintiff in error claims in effect that there is no difference in the nature of the liability of the city upon the "special improvement bonds," issued under section 17, and upon the "general improvement bond," issued under section 19, nor in the kind of tax to be levied to pay them. If this be so, then language has been invented for little purpose, and legislative enactments are a deceptive farce. The language of the two sections is in sharp contrast. Section 17 provides:

"And for the payment of said bonds, assessments shall be made * * upon the taxable property chargeable therewith as is provided in the third clause of the second subdivision of the preceding section, (section 16)."

While section 19 provides that "the council shall levy taxes on all the taxable property within the city * * * to pay said bonds at their maturity."

As well might a holder of bonds issued under section 19 claim that he was entitled to the levy of the special assessment provided for in sec. 17.

IV. Another evidence that the law intends a difference between these two classes of bonds, and in the nature of the liability of the city upon them, is the fact that section 19 and every other section of the law governing cities of the second class, which authorizes the issue of bonds creating a general liability, and made payable by the levy of general taxes, prohibits so doing, except when authorized thereto by a vote of the people, (see sections 19 and 46, laws of Kansas, 1871, pages 150 and 157), while section 17 does not require the vote of the people. It is, and always has been, the invariable practice in this State to prohibit the issuance of bonds, payable in general taxes, by any municipal corporation, except upon a vote of the people.

V. The plaintiff in error made its demand and bases its action upon sections 21 and 22 of said act, which are in full, as follows, to wit:

SEC. 21. The city council are hereby required to make provision from time to time for a sinking fund to redeem at maturity the bonded indebtedness of the city, and the taxes levied for said sinking fund shall be payable only in cash.

"SEC. 22. The city council are authorized and required to levy annually taxes on all the taxable property within the city, in addition to other taxes, and in sufficient amount for the purpose of paying the interest and coupons as they become due on all the bonds of the city now issued, or hereafter to be issued by the city, which taxes shall be payable only in cash."—Laws of Kansas, 1871, page 151.

Section 21 provides only for a sinking fund, and is the only section upon that subject, but it could not be intended to apply to bonds issued under section 17, for the entire amount maturing each year is intended to be fully provided for by the assessments. To include these bonds within the intendment of section 21 would require the levy and collection of special assessments each year sufficient to pay the amount of bonds and interest maturing for that year, and also the levy of general taxes to the same amount, and for the same pur-

pose, which is so improbable that nothing but the very plainest express provisions would be held to intend that construction.

Section 22 relates only to a levy for interest; but an express and special provision having been made for this purpose in section 17, a court would be averse to applying the more general provision of section 22, especially when to do so would be opposed to the plain intention, that only special assessments should be applicable to debts for special improvements. "The express mention of one thing is the exclusion of all others," a rule which directly applies.

It will also be noticed that the said act above referred to is an amendatory act to chapter 19 of the General Statutes of 1868; that is, of the law governing cities of the second class, and that sections 21 and 22, under which relator claims, are exact copies of sections 43 and 44 of said chapter 19 of the General Statutes of 1868. (See General Statutes of Kansas, 1868, page 167.) While section 17, under which these bonds were issued is an entirely new section, and one of the amendatory sections, which further indicates that sections 21 and 22 were not intended to apply to bonds issued under section 17, but that sections 16 and 17 were intended to be complete in themselves, authorizing a special kind of bond and providing a special manner of payment. Sections 19 and 46 are also re-enactments, and sections 21 and 22 doubtless refer to bonds issued under those sections.

The city council, too, has given section 17 the same pactical construction by enacting in the ordinance above quoted that these bonds—

"Shall be paid, principal and interest, *solely* from special assessments to be made upon and collected *solely* from the lots and pieces of ground fronting upon or extending along the street the distance improved, in the manner provided in sections sixteen and seventeen," etc.

The holders of these bonds are entitled to what the law gives them and nothing more. This the city alleges it has given them. If they are not satisfied with the assessments

as made they can show wherein they are injured by any failure or neglect on the part of the city, and if shown to be entitled to a new levy of assessments the courts will order a new one. They knew what they were purchasing when they bought these bonds. The city gave them full notice by the recital upon the face of the bond. Having this notice, and having fully investigated the law and the ordinance mentioned in the recital, if they then bought, they ought not to complain. No prudent man would buy without following up the notice given in the recital, and if not satisfied he was in no wise compelled to buy. A municipal corporation is held bound by these recitals, and certainly the converse of that is equally true, and the holders of bonds must also be bound by the recitals. The holder is bound to diligence.

George *vs.* Oxford Township, 16 Kan., 72; McClure *vs.* Township of Oxford, 94 U. S., 429; and Judge Dillon in this case held the relator bound by the ordinance as well as the statute since notice of both was given in the recital, and an ordinance was necessary to authorize the issuance of the bonds.

VI. The question of the general liability of municipal corporations under similar laws has been frequently before the courts, and the uniform ruling has been that the only liability is, the special liability created by law, and that the creditor must look to that only.

In McCullough *vs.* The Mayor, &c., of Brooklyn, 23 Wend., 458, in an action for damages for the taking of land for street purposes by the city of Brooklyn, it was decided that assumpsit would not lie against the city, because the law provided that it should be paid for in assessments upon the property benefitted. That the only remedy was mandamus to compel the levy of the assessments provided by law and a demurrer to the declaration was sustained.

Afterwards, in Lake *vs.* Trustees of Williamsburgh, 4 Den., 520, it was decided that "where public improvements in an incorporated village are by law to be made at the expense of the lot owners, the only duty of the corporation is to take

the necessary legal steps to have the improvements made in proper cases, and to make a right application of the funds as they are received," and reversed the judgment against the corporation, using the language that "when the whole truth should come out it would be apparent that there was no legal claim upon the corporation" under the law.

Again, more recently, in Hunt *vs.* the City of Utica, 18 N. Y., 442, the same doctrine is affirmed, and it is held—

1. "That the provisions of the charter, * * * in respect to the time and *mode* of payment, were to be taken as a part of the contract.

2. "The effect was to require the city authorities to make and collect an *assessment*, with reasonable diligence, after the expense of the work should be ascertained, and to pay over the money when collected.

3. "That no action was maintainable by the plaintiff against the city until *after* the assessment and collection of his compensation," and that one dealing with such a corporation is bound to take notice of the law under which they act.

In Wisconsin it has been several times decided that in such cases the creditor must bring mandamus unless the money has been actually collected and in the city treasury, and this must be alleged and proved to maintain an action against the city.—Eilert *vs.* the City of Oshkosh, 14 Wis., 586; Whalen *vs.* La Crosse, 16 Wis., 271; Silkman *vs.* Milwaukee, 31 Wis., 555; Finney *vs.* Oshkosh, 18 Wis., 209.

In Michigan it is also the rule that the corporation is only liable for the special assessment.—The People *vs.* Township of Zilwaukie, 10 Mich., 274; Goodrich *vs.* Detroit, 12 Mich., 279; Bank *vs.* the City of Lansing, 25 Mich, 207; see also 13 Ind., 245; Casey *vs.* Leavenworth, 17 Kan., 189.

Casey *vs.* Leavenworth is very similar to this case. In that the contractors were bound to "look exclusively to said special assessments for their pay." In this the ordinance binds the bondholder to look for payment "solely from special assessments."

Upon the authority of these cases, which we presented in a brief filed in the court belew before Judge Dillon, who tried the case, we resisted the rendition of judgment in any form against the city, but Judge Dillon, following his decision in the case of Jordan *vs.* Cass County, which had then been affirmed, Cass County *vs.* Jordan, 95 United States, 373, decided that the plaintiff was entitled to judgment against the city, "to be enforced and collected, pursuant to law, in such case made and provided," as judgment in some form was a necessity to enable the plaintiff to pursue his remedy in the Federal courts to effect. See, also, County of Cass *vs.* Johnson, 95 United States, 360, where this form of judgment is approved.

Since the rendition of this judgment the Hon. Henry C. Caldwell, judge in the case of Boro. *vs.* Phillips Co., in the Circuit Court for the eastern district of Arkansas, 6 Central Law Jl., 409, in quite a similar case, refused judgment and decided that the only remedy was mandamus. Judge Caldwell evidently would concur with Judges Dillon and Foster in refusing the relator a mandamus for a general levy in this case.

That Judge Dillon did not intend or construe his judgment against the city of Fort Scott in this case to be an absolute judgment, but, on the contrary, to be the same in effect as in Jordan *vs.* Cass Co., above cited, is conclusively determined by the fact that he refused a general mandamus as prayed for by the relator, and dismissed the information because it asked the levy of a tax other and different than the tax "in such case made and provided."

VII. The power of legislatures to fix special tax districts and authorize the levy of special taxes therein, upon the theory of special benefits in certain cases, such as draining swamps, building ditches and roads in the country, and sewers, sidewalks, and streets in cities, is too old and too firmly settled to require discussion. That it has been the rule so long is an evidence of its fairness and justice, and it is undoubtedly true that many of these improvements never could be made

except in this manner. See Reeves *vs.* the Treasurer of Wood Co., 8 Ohio State, 333, where Judge Brinkerhoff discusses the principle involved, and shows how ancient and general its application has been. In Ohio, the "Ditch Act," under which the case of Reeves *vs.* Wood arose, continued in force, and was acted under until 1866, when new acts, similar in all respects to this portion of the Kansas act governing cities of the second class, were passed. (See Laws of Ohio, 1866, page 114, and amendments thereto, Laws of 1867, page 80, also 1868, page 41.) Under these acts, and the amendments thereto, counties were authorized to improve and build roads and ditches, and to assess the cost upon the adjoining lands for two to four miles upon each side of the road or ditch improved, and to issue bonds of the county, to be paid in these assessments. These laws have been sustained and enforced in several well considered cases. 25 O. S. 308, where these laws are quite fully discussed; also 28 O. S. 326 and 29. O. S. 513.

In The State *ex. rel. vs.* Mitchell, 31 O. S. 592, a similar law is passed upon, and the assessment sustained, upon the theory that the bonds of the city of Columbus had been issued, and the only provision of law for their payment was assessments upon the property improved, though the law itself was held unconstitutional upon another point.

The law under which these bonds were issued is doubtless borrowed from these Ohio road and ditch laws, and to overturn it and give the relator a mandamus for the levy of a general tax is to overturn not only a law which has been acted under by every city of the second class in this State, for nearly ten years, but to overturn similar laws in Ohio, Michigan, Arkansas, and many others of the States. The amount involved in this case is an unpaid balance of about $10,000 due for the improvement of one street, but the amount actually involved is about $50,000. Seven or eight times that amount had been issued by the city of Fort Scott alone, the most of which had been paid when this suit was commenced and payments largely stopped, the property-owners

reasoning that if the city was liable the property improved was not. If the law is sustained, and the relator also held entitled to thelevy of a general tax, then the city must levy such general tax to pay off these bonds, keep an account of how much is paid by general tax, and who paid it, and refund the amount out of these special assessments as collected to those who paid the general and special tax both, a *modus operandi* quite too complicated to be supposed for a moment to have been intended by the legislature. On the other hand, if the law is sustained according to its manifest intendment, all this complication of accounts and proceedings is avoided and the relator relegated to his assessment, which will doubtless be paid as soon as this complication is settled. It would operate unjustly upon those who have paid their assessments to be now compelled to pay again in general taxes, especially when the burden so imposed would be by a construction of the law in manifest opposition to express letter and intent.

Von Hoffman *vs.* Quincy, 4 Wall., 535, decides that a law providing a *special tax* for the payment of bonds becomes a part of the contract, and cannot be modified or repealed, but the relator in this case asks a judicial determination which shall have the effect condemned in that case.

Purchasers of these bonds cannot pretend ignorance on their part, nor deception by the city, for the recital upon the face of each bond, of which holders are compelled to take notice, fully notifies them not only of the act but of the very section of the act, and of the ordinance under which the bonds were issued. Neither can any hardships be urged, for no one was compelled to purchase, and all had full notice of what was offered for sale.

We submit that in the two Cass County cases above cited this court has decided the principle involved in this case, each being a bond payable by a levy of taxes, as provided by law, upon a portion only of the municipality.

VIII. The plaintiff in error relies much upon the cases against Clark County, Mo., in 5 Otto, 769; 6 Otto, 211, and

the case against Pittsburgh, decided November 18, 1878. He certainly cannot reverse this case upon the authority of United States *vs.* Clark County, 5 Otto, 769, for in that the judgment of the court below was affirmed, that is, the mandamus asking for the levy of a general tax was denied; hence that case is an authority in our favor. The case in 6 Otto, 211, may be considered as supplemental to the first one. In this case the court did not modify its views expressed in 5 Otto, 769, but decided, first, that the bond was a general indebtedness payable in general taxes to be levied upon the whole county; and, second, that for that reason when the special fund was exhausted the bondholder still stood as a general creditor of the county and so entitled, not to a general levy of additional taxes, but to a county warrant upon the general fund. But in this case, if the city of Fort Scott had not issued any bonds, the contractor or his assignees, which the bondholders really are, would clearly have been confined to the special fund, and if that did not pay him he was without remedy for the balance, as was decided in New Albany *vs.* Sweeney, 13 Ind., 245, and in Kingsbury vs. Pettis County, 17 Mo. and 48 Mo., to which the court has been twice cited at this term. See, also, the cases above cited to the same effect. In the case of Jordan *vs.* Cass County, and Johnson *vs.* Cass County, above cited, this court not only approved the form of judgment rendered by Judge Dillon, but also his ruling, that although the judgment was against the county, the mandamus must be for the levy of taxes upon the township for whose use and benefit the bonds had been issued.

Now, if the Clark Co. cases were like these Cass Co. cases, and this court had decided that in case these townships failed to pay, then the bondholders could compel the county to pay, they would be in point in this case. The cases we have cited above from New York, Wisconsin, and Michigan, are also strongly in point, for there certainly can be no difference between a bond payable in special assessment and a general contract payable in special assessments, especially when both the law and the ordinance under which they are made

specially provide for payment in that manner, and provide an ample amount. It is to be noticed that in United States *vs.* Clark Co., 6 Otto 211, there is a strong dissenting opinion, and since that time the supreme court of Missouri has construed that law and decided the same way. As that question is again before this court we forbear further comment.

It certainly seems competent for a State legislature to create special tax districts, and provide for the payment of obligations by taxes, to be levied upon such districts, as was done in this case. To reverse this case is practically to decide that a legislature has no such power, for no more apt language could be used to attain that end than is used in section 17 of this act. And when such bonds had been authorized, a contractor nor his assignees were under no obligations to take them. To issue bonds of this kind for local improvements is certainly as economical as the other and more common way of paying only in a single payment which has been sustained so generally, as shown by the authorities above cited. It will be noticed, too, that section 17 authorizes the issuance of these bonds only in paying a contractor for improvements done, and do not authorize them to be issued for the purpose of borrowing money, as may be done under section 19 above quoted.

In the Pittsburgh case the opinion shows that the bonds were to be issued and sold for not less than par for the purpose of borrowing money, which was to be paid into the general treasury of the city, and to be paid out upon the order of the commissioners from time to time, as needed. The bonds recited that for the true and faithful payment of the sum of money mentioned in each bond, together with the interest thereon, "*the faith, credit, and property of the city of Pittsburgh*" are solemnly pledged, which, the court says, was a construction by the city of Pittsburgh itself at the time they were issued, that the bonds were a general indebtedness, to the payment of which the credit of the city was pledged. But the city of Fort Scott did not make any such pledge or recital, but construed its authority just as we do

now. In the Pittsburgh case the law does not specially provide that the bonds shall be paid in assessments, but only that the improvements, when made, shall be so paid.

The law further provided that in case the assessments, when collected, were insufficient, the city *should pay the amount then due out of the other funds of the city and reimburse itself out of the assessments.* So then the Pittsburg case was one in which the city was authorized to borrow money, issue its bonds therefor, for the payment of which it pledged the faith, credit and property of the city, and to pay them as they became due out of any funds in the city treasury, reimbursing itself out of the assessments when collected; hence the court held the bonds to be a part of the general indebtedness of the city. But each and all of these elements are lacking in this case. The city of Fort Scott was not authorized by section 17 to issue bonds for the purpose of borrowing money. Under section 19 it could borrow money upon bonds, but only when authorized thereto by a vote of the people, and this fact alone places this in sharp contrast with the Pittsburgh case. It did not and had no power to pledge "the faith, credit, and property of the city of Fort Scott" for the payment of these bonds. It was not authorized or required to pay any portion of either the principal or interest of these bonds out of the general funds of the city, and reimburse itself out of the assessments, but could only pay out of the assessments.

A bondholder should be held to the same good faith in abiding by the terms of the contract made in the bond he has purchased as the corporation. They are not so blind that they cannot see the law of the contract they are asked to buy, nor usually so poor that they cannot pay some one to explain what it is. They say a good deal sometimes about honesty and good morals, but no man is deceived or defrauded who has full notice, from the face of the instrument, of just what he is buying as they had in this case. No attempt whatever was made to deceive or overreach any one. The city of Fort Scott put full notice upon each bond, not of the statute alone, as plaintiff in error seems to mean, but of the very section of

the statute and of the ordinance under which the bonds were issued. It levied an amount amply sufficient to pay all the bonds and interest. It paid over all amounts to the holders of these bonds as fast as collected. It observed the utmost good faith as it understood its duty, and doubtless every dollar will be paid on these bonds once this trouble is settled.

This is a matter of great importance to such small towns, for it affords a valuable means of securing such local improvements, which can never be done if the city is to be held generally liable, nothwithstanding the seemingly plain meaning of the law.

To reverse this case we submit this court must practically reverse not only the Cass County cases, but also Von Hoffman *vs.* Quincy, in which it is held that the tax provided by the law becomes a part of the contract, upon the performance of which the bondholders may insist, and we submit the rule is equally strong in favor of the corporation defendant.

If the views herein expressed are correct, then the judgment of the court below should be affirmed.

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